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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 427. 169

THE CLEVELAND ROLLING MILL COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES D. RHODES AND DAVID C. BRADLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1883.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for the northern district of Illinois, on Saturday, the twenty-eighth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and eighth year.

WM. H. BRADLEY, *Clerk.*

Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
CLEVELAND ROLLING MILL COMPANY.

Be it remembered that on the ninth day of January, A. D. 1882, came the plaintiffs, by their attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their *præcipe* for a writ of summons and bond for costs in said entitled cause, which said *præcipe* and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

United States Circuit Court, Northern District of Illinois.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
CLEVELAND ROLLING MILL COMPANY.

To Hon. William H. Bradley, clerk of above court:

Upon affidavit and bond filed in the above-entitled cause please issue attachment against the property, &c., of the defendant above named, returnable to the next March term of this court, and also summon the firm of Brown, Howard and Company, consisting of Walston H. Brown, William B. Howard, and Columbus R. Cummings, as garnishees, to be and appear at the said court on the first Monday of March next, said action being trespass upon the case on promises; damages, $100,000.

Chicago, January 9, 1882.

Yours, &c., EMERY A. STORRS,
Plaintiffs' Attorney.

Endorsed: Filed Jan. 9, 1882. Wm. H. Bradley, clerk.

3 *Bond for Costs.*

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Circuit Court, March Term, A. D. 1882.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
CLEVELAND ROLLING MILL COMPANY.

In trespass on the case.

I enter myself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiff- of any costs ordered or adjudged to be paid — them, I hereby agree and stipulate that execution may issue against my property *my property* for any costs taxed against them.

Dated this ninth day of January, A. D. 1882.

EMERY A. STORRS.

Endorsed: Filed Jan'y 9th, A. D. 1882. W. H. Bradley, clerk.

On the same day, to wit, on the ninth day of January, A. D. 1882, there issued out of said clerk's office a writ of summons in
4 said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court of the United States of America.

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon Cleveland Rolling Mill Company, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Charles D. Rhodes and David C. Bradley of a plea of trespass on the case upon promises to their damage, as it is alleged, of one hundred thousand dollars; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 9th day of January, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 106th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

5 *Marshal's Return.*

I have served the within writ on the Cleveland Rolling Mill Co. by reading the same to and in the presence and hearing of N. D. Pratt, agent of said company, this 9th day January, 1882.

A. M. JONES, *U. S. Marshal,*
By R. D. SHERMAN, *D'p't.*

Endorsed: Filed Jan'y 19th, A. D. 1882. W. H. Bradley, clerk.

On the same day, to wit, on the ninth day of January, A. D. 1882, came the plaintiffs, by their attorney, and filed in said clerk's office their affidavit of amount due and attachment bond in said entitled cause, which said affidavit and bond are, respectively, in the words and figures following, to wit:

Affidavit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Charles D. Rhodes, being duly sworn, deposes and says that he is a member of the firm of Rhodes and Bradley, said firm being composed of this deponent and David C. Bradley; that this deponent and the said David C. Bradley are citizens of the State of Illinois,
6 and are both residents of the city of Chicago, in said State of Illinois; that the Cleveland Rolling Mill Company is a corporation created, existing, and doing business under and by virtue of the laws of the State of Ohio, and is, and its stockholders are, citizens of that State; that the said Cleveland Rolling Mill Company is indebted to the said firm of Rhodes and Bradley in the sum of one hundred thousand dollars upon certain contracts made and entered into between the said Cleveland Rolling Mill Company and the said Rhodes and Bradley for the sale by the said Rhodes and Bradley to the said Cleveland Rolling Mill Company of the product of fourteen thousand tons of iron ore, to be manufactured into pig-iron by the Leland Furnace Company, of Leland, Michigan, and which said iron said Cleveland Rolling Mill Company agreed to receive as rapidly as shipped and pay to said Rhodes and Bradley the sum of forty-five dollars per ton therefor; that the said Cleveland Rolling Mill Company refused to receive said iron in pursuance of said contract and refused to pay therefor, whereby the said Rhodes and Bradley suffered and sustained damage to the sum of one hundred thousand dollars.

And deponent further states that the said Cleveland Rolling Mill Company is not a resident of this State, and that its place of residence is Cleveland, in the State of Ohio.

7 And further deponent saith not.

CHAS. D. RHODES.

Subscribed and sworn to before me this 9th day of January, A. D. 1882.

H. S. STODDARD,
U. S. Com.

Endorsed: Filed Jan. 9, 1882. Wm. H. Bradley, clerk.

Attachment Bond.

Know all men by these presents that we, Charles D. Rhodes, David C. Bradley, and William Borden, constituting the firm of Rhodes and Bradley, are held and firmly bound unto the "Cleveland Rolling Mill Company" in the penal sum of two hundred dollars, lawful money of the United States; for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of January, A. D. 1882.

The condition of this obligation is such that whereas the above-bounden Charles D. Rhodes and David C. Bradley have, on the day of the date hereof, prayed an attachment out of the circuit court of the United States of America for the northern division of Illinois
8 against the estate of the above-named Cleveland Rolling Mill Company for the sum of one hundred thousand dollars, and the same being about to be sued out of said court, returnable on the first Monday of March, A. D. 1882, to the term of the said court then to be holden: Now, if the said Charles D. Rhodes and David C. Bradley shall prosecute their said suit with effect, or, in case of failure therein, shall, well and truly, pay and satisfy the said Cleveland Rolling Mill Company all such costs in said suit and such damages as shall be awarded against the said Cleveland Rolling Mill Company, their executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

RHODES & BRADLEY. [SEAL.]
DAVID C. BRADLEY. [SEAL.]
CHARLES D. RHODES. [SEAL.]
WM. BORDEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
H. S. STODDARD.

Endorsed: Filed and approved by me this 9th day of January, A. D. 1882. W. H. Bradley, clerk.

9 On the same day, to wit, on the ninth day of January, A D. 1882, there issued out of said clerk's office an attachment writ in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Attachment Writ.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court of the United States of America.

The United States of America to the marshal of the northern district of Illinois, Greeting:

Whereas Charles D. Rhodes and David C. Bradley hath complained

that the Cleveland Rolling Mill Company is justly indebted to them to the amount of one hundred thousand dollars, and oath having been also made that the said Cleveland Rolling Mill Company is not a resident of said northern district of Illinois, but that its place of residence is in the State of Ohio;

And the said Charles D. Rhodes and David C. Bradley having given bond and security according to law, we therefore command you that you attach so much of the estate, real or personal, of the said Cleveland Rolling Mill Company to be found in your district as shall be of value sufficient to satisfy the said debt and
10 costs, according to the said complaint, and such estate so attached in your hands to secure or so to provide that the same may be liable to further proceeding thereupon according to law, and that you summon the said Cleveland Rolling Mill Company to appear and answer the complaint of the said Charles D. Rhodes and David C. Bradley, at a circuit court of the United States for the northern district of Illinois to be holden at Chicago, in the district aforesaid, upon the first Monday of March next, and that you also summon A. D. Pratt and Brown, Howard and Company, and such other persons as you shall be required by the said garnishors as garnishees, to be and appear before the said court on the said first Monday of March, A. D. 1882, then and there to answer what may be objected against them, when and where you shall make known to the said court how you have executed this writ; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this ninth day of January, in the year of our Lord one thousand eight hundred and eighty-two, and of our Independence the 106th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

11 *Marshal's Return.*

I have executed this writ by reading the same to G. H. Ives, agent of Brown, Howard and Company, on the 9th day of January, 1882, and by delivering to him a true copy of this writ to Brown, Howard & Co. on the 10th day of Jan'y, 1882, and by reading the same to N. D. Pratt on the 9th of Jan'y, 1882.

A. M. JONES,
U. S. Marshal,
By R. D. SHERMAN, *D'p't.*

(Endorsed:) Filed M'ch 3d, A. D. 1882. W. H. Bradley, clerk.

12 Afterwards, to wit, on the fifteenth day of April, A. D. 1882, came the plaintiffs, by their attorneys, and filed in said clerk's office their declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

United States Circuit Court. May Term, A. D. 1882.

CHARLES D. RHODES and DAVID C. BRADLEY, Plaintiffs,
vs.
THE CLEVELAND ROLLING MILL COMPANY, Defendant.

Charles D. Rhodes and David C. Bradley, plaintiffs in this suit, by Emery A. Storrs, their attorney, complain of The Cleveland Rolling Mill Company, defendant in this suit, summoned, &c., of a plea of trespass on the case on promises—

For that whereas the said plaintiffs are residents and citizens of the State of Illinois aforesaid, and were partners and manufacturers of and dealers in pig-irons and other iron findings at, to wit, *at*
Chicago, in the said northern district of Illinois, at the time
13 of the making of the contract hereinafter alleged between
said plaintiffs on the one part and said defendants, a corporation duly organized and existing under the laws of the State of Ohio, a citizen and resident of Cleveland, in said State, on the other part.

And the said plaintiffs aver that heretofore, to wit, on the 14th day of January, 1880, they made and entered into a contract in writing under their firm name of Rhodes & Bradley with the Leland Iron Company, which said Leland Iron Company is a corporation organized under the laws of the State of Michigan and engaged in the business of manufacturing pig-iron; and in and by said contract it was agreed between these plaintiffs and said Leland Iron Company as follows, to wit: The said plaintiffs agreed to furnish and deliver to said Leland Iron Company, on board vessel at Escanaba, in the State of Michigan, fourteen thousand tons of iron ore, to be by said company manufactured into pig-iron, which said ore was to be of the kind and qualities following, at the following-named prices, to wit: 5,000 tons Norway mine ore, at $6.25 per ton; 6,000 tons Cleveland mine hard ore, at $8.75 per ton; 1,500 tons Rolling Mill hemitite ore, at $6.75 per ton, and 1,500 tons Stephenson mine ore, at $6.50 per ton. The delivery of said Cleveland mine ore, it was by said contract agreed, should be subject to the contingencies of strikes and accidents at the mine, as pro-
vided in a certain contract between these plaintiffs and
14 the owners of said mine; and said contract further provided
that in case the freight from Escanaba should be more or less than $1.25 per ton the loss or gain on the same should be divided between said parties, and plaintiffs in said contract agreed to pay sight-drafts drawn by said iron company for amount of freight as fast as earned, and charge the same to the said iron company. These plaintiffs in said contract also agreed to deliver 1,500 tons of said ore in May, 1880, navigation permitting, and 2,500 tons each month thereafter as nearly as it could reasonably be done, and to deliver all of said ore to vessels before November 1st, 1880.

And plaintiffs further agreed in said contract to purchase from said Leland Iron Company the entire product of said fourteen thousand tons of ore when by it manufactured into pig-iron at and for the price of $40 per ton, delivered at Chicago, in the State of Illinois, or $40.25 per ton delivered at Cleveland, in the State of Ohio, at the option of these plaintiffs, and the said Leland Iron Company by said contract further agreed to manufacture all of the ore received under the contract into pig-iron of the grade and quality desired by plaintiffs as nearly as practicable, and to ship the same in cargo lots as rapidly as possible after manufacture to these plaintiffs at Chicago or Cleveland at the option of plaintiffs as aforesaid.

15 Plaintiffs further aver that after making said contract with the said Leland Iron Company as aforesaid, to wit, February 16th, 1880, they did, under the name and style of Rhodes & Bradley, make and enter into a contract in writing with the defendant, The Cleveland Rolling Mill Company, in and by which said written contract the said defendant and these plaintiffs mutually covenanted and agreed as follows—that is to say :

These plaintiffs in and by said contract sold to said defendant, and said defendant agreed to receive and pay for to these plaintiffs, the entire product of the said fourteen thousand tons of ore to be delivered to and manufactured into pig-iron by the Leland Iron Company of Michigan, under its contract with these plaintiffs as hereinbefore set forth, which said iron these plaintiffs in said contract with defendant agreed should be manufactured with charcoal into number one and number two iron as nearly as possible, and to ship the same in vessel cargoes to the defendant at Cleveland as rapidly as possible during the season of navigation of the year 1880, and such portion of the product of said ore as was made after the close of navigation in 1880 these plaintiffs agreed to ship by vessels to Cleveland on the opening of navigation in 1881, or as near the opening of navigation as possible; and these plaintiffs

16 further agreed that the defendant should have the privilege of ordering the iron made too late for shipment during the season of navigation in 1880 through by railroad to Cleveland during the winter of 1880 and 1881, it, said defendant, paying the additional cost of hauling to railroad and freighting to Cleveland over and above what it would cost plaintiffs to ship by lake on opening of navigation in 1881.

And said defendant, upon its part, in and by said contract, further agreed to receive said iron as rapidly as shipped to it by plaintiffs there for the sum of forty-five dollars ($45) per ton of twenty-two hundred and forty (2,240) pounds each cash at time of delivery on rail or vessel at Cleveland, Ohio, and said defendant further agreed to furnish a good and sufficient dock at which to unload the vessels in which said iron was shipped, and to pay to such vessels any demurrage they might be justly entitled to by reason of delay in furnishing a dock at which said vessels could be discharged. And it was further agreed between said parties in and by said contract that the defendant should have the option of taking a portion of said iron delivered at Chicago, Illinois, upon the same terms and conditions as herein-

before set forth for delivery at Cleveland, Ohio, and in said contract it was further agreed and recited that as the contract of the
17 plaintiffs with the mining companies which were to furnish said ores provided that in case of accident or strikes at their mines, resulting in reduced output or product of ore, the said companies were to have the privilege of reducing the amount of ore due to these plaintiffs in same proportion as other sales; that the said defendant should not hold plaintiffs liable for the delivery of pig-iron under said contract beyond the product of such ores as were delivered to plaintiffs by said mining companies, and said defendant also in said contract agreed that in case of accidents or strikes at the furnace of the said Leland Iron Company, resulting in the stoppage of said furnace, then, in that case, these plaintiffs were not to be held responsible for delivery of pig-iron under said contract beyond the responsibility of the said Leland Iron Company to these plaintiffs under the contract with them, as hereinbefore set forth, and the said contract with the said Leland Iron Company and the contracts of plaintiffs with the said mining companies who were to furnish ore out of which said iron was to be made were, by stipulation therein contained, made part of the said contract between these plaintiffs and said defendant herein sued upon and set forth, copies of all of which the said several contracts and agreements are hereunto attached and made a part hereof, being marked Exhibits "A" to "F," respectively.

18 Plaintiffs further aver that they have fully performed all and singular the agreements, covenants, and conditions in and by said contract with the said Leland Iron Company, and in and by said contract between these plaintiffs and the defendant, as hereinbefore set forth by them to be performed, and have fully executed, complied with, and performed said contracts upon their part.

Plaintiffs aver that the fourteen thousand tons of ore mentioned in said contract with the said Leland Iron Company were by them duly delivered to said iron company as provided in said contract, and that said iron company, upon such delivery, immediately began the manufacture of said ore into pig-iron and worked continuously at such manufacture until all of said 14,000 tons of ore was made into pig-iron, and that the entire product of said ore amounted to eight thousand and seventy-five tons and three hundred pounds of iron, and that, as rapidly as the same was so manufactured, these plaintiffs from time to time shipped the same in cargo lots, as provided in their contract with defendant, to the defendant at Cleveland, Ohio, and, up to the 7th day of May, 1881, the said defendants had received and paid for of said iron and product ninety-four hundred and twenty-two tons; and thereafter, to wit, May 7th, 1881, these plaintiffs, in pursuance of their said contract, shipped
19 to defendants a cargo lot of said iron, part product of said ore, amounting to five hundred and fifty-four tons and 610 pounds, and when said cargo reached the city of Cleveland it was, on said 7th day of May, duly tendered to said defendant, and payment therefor at the contract price duly demanded, but that said

defendant then and there refused, and still does refuse, to receive said cargo of iron, or any part thereof, or to pay the contract price therefor, or any part thereof.

Plaintiffs further aver that thereafter, to wit, on May 16th, 1881, they duly tendered to said defendants another cargo of said iron, product of said ores, amounting to five hundred and eighty-three tons and 740 pounds, and duly demanded payment for the same at the contract price aforesaid, which said cargo of iron the said defendant refused to receive, and still does refuse to accept, the same, or any part thereof, and then and there refused, and still does refuse, to pay, to these plaintiffs the said contract price therefor, or any part thereof.

And on the following dates these plaintiffs, in pursuance of their said contract duly shipped to said defendant at Cleveland, in vessel cargoes, the following amounts and quantities of said iron, product of said ore, as follows, to wit: May 20th, 1881, by propeller "Norman," five hundred and ninety tons and four hundred pounds; May 24th, 1881, by schooner "M. J. Wilcox," six hundred
20 and ninety-seven tons and 1,300 pounds; June 8th, 1881, by propeller "Norman," five hundred and ninety-four tons and 1,570 pounds; June 4th, 1881, by schooner "F. J. King," five hundred and fifty-seven tons and 2,120 pounds; June 23d, 1881, by propeller "Norman," five hundred and ninety tons and six hundred and thirty pounds; July 2nd, 1881, by propeller "Norman," four hundred and eighty-four tons and 1,790 pounds; each of which cargoes arrived at Cleveland by due course of transportation, and on the arrival of each the same was by these plaintiffs duly tendered to the said defendant in pursuance of said contract, and the said defendant then and there, at the time of each tender, refused to receive said iron, or any part thereof, and still does refuse to receive the same, and, although at the time of each tender requested so to do, at the time refused to pay these plaintiffs the contract price of said iron, or any part thereof, and still does refuse to pay the same, or any part thereof.

Plaintiffs further say the aggregate amount of the iron so shipped and tendered to the defendant, and which said defendant, in violation of its said contract, so refused to receive and pay for to these plaintiffs as aforesaid, is four thousand six hundred and fifty-three tons and three hundred pounds, and that, by virtue of said contract, as hereinbefore set forth, the said defendant is justly and truly in-
debted to these plaintiffs for said four thousand six hundred
21 and fifty-three tons and three hundred pounds of said iron at the price by it agreed to be paid in said contract.

And these plaintiffs aver that, although they have, as hereinbefore alleged, fully complied with and performed all and singular the agreements, conditions, and covenants by them to be performed under said contract with said defendant, and have duly tendered to the defendant the entire product of the said fourteen thousand tons of ore mentioned in said contract, as therein provided, yet the said defendant has hitherto refused, and still does refuse, to receive and pay for the said four thousand six hundred and fifty-three tons and

three hundred pounds of said iron as by virtue of said contract it is bound to do, and has hitherto wholly refused and neglected, and still does refuse, to further carry out said contract upon its part, to the damage of these plaintiffs in the sum of one hundred thousand dollars, and therefore they bring suit, &c.

EMERY A. STORRS,
Att'y for Pl't'ffs.

22 EXHIBIT A.

Contract Between Rhodes & Bradley and Cleveland Iron Mine.

"DEC. 29TH, 1879.

"Messrs. Rhodes & Bradley.

"GENTLEMEN: We will sell you six thousand (6,000) tons of our No. 1 ore, delivered on cars at our mines in about equal quantities monthly, from May to November next, inclusive, at six and $\frac{50}{100}$ dollars ($6.50) per gross ton, payable on the 10th day of each month in cash for the ore delivered the preceding month, it being understood and agreed that in case of accident at the mine or any other event which may happen there to reduce our production the above amount is to be reduced in the same proportion as our other sales.

"Yours truly, FRED. A. MORSE, *Sec'y.*"

23 EXHIBIT B.

Rhodes & Bradley's Contract With the Menominee Mining Co. for "Norway Ore."

"MILWAUKEE, *Dec.* 26, 1879.

"Rhodes & Bradley, Chicago, Ills.

"GENTLEMEN: The Menominee Mining Co. proposes to sell you ten thousand tons Norway iron ore, to be delivered f. o. b. vessels at Escanaba in about equal quantities, monthly, during the season of navigation of 1880, at five and $\frac{25}{100}$ dollars per gross ton. Payment for same to be made on the 15th day of the month for all ore delivered the previous month in cash.

"Yours, &c., J. J. HAGERMAN, *Pres.*

"Accepted.
"RHODES & BRADLEY."

24 EXHIBIT C.

Rhodes & Bradley's Contract for the "Rolling Mill Mine" Ore.

"Messrs. Rhodes & Bradley, Chicago, Ills.

"GENTLEMEN: I will sell you sixteen thousand and five hundred tons of 'Berringer hematite iron ore,' from the 'Rolling Mill mine,' of standard quality, of which fifteen thousand tons is for the 'Joliet Steel Co.,' and fifteen hundred tons for the 'Leland Furnace Co,' delivered on cars at said mine in about equal quantities monthly

during the season of navigation in 1880, commencing in April or May to November, inclusive, at 4 and $\frac{50}{100}$ dollars ($4.50) per gross ton, and payable on the 10th of each month, in cash, for the shipments of the preceding month; it being also understood and agreed that in case of accident at the mine or any other event that may happen to reduce the production from the mine the above amount is to be reduced in proportion as my other sales. Your acceptance of above will be a sufficient contract between us.

"GEORGE BERRINGER,
"*Lessee Rolling Mill Mine.*
"By SAMUEL MATHER,
"*His Agent.*"

25 EXHIBIT D.

Contract of Rhodes and Bradley for Ore from the Stephenson Mine.

"MILWAUKEE, *April 14th*, 1880.

"Please to deliver to Messrs. Rhodes & Bradley, of Chicago, three thousand gross tons of iron ore from the Stephenson mine, they to take the ore upon the same terms of our contract with your company; the ore delivered to them to apply as a part of the 10,000 gross ton- purchased of you.

"J. M. BEAN,
"*Sec'y Spring Lake Iron Co.*

"To H. Ludington, pres't of Lumberman,s Mining Co."

Endorsed: "Accepted. H. Ludington, prest. Lumberman's Mining Co."

26 EXHIBIT E.

Rhodes and Bradley's Contract with the Leland Iron Company.

"CHICAGO, *January 14th*, 1880.

"Agreement made this day between Messrs. Rhodes & Bradley, of Chicago, and the Leland Iron Company, of Detroit, witnesseth:

1st. Rhodes & Bradley agree to furnish the Leland Iron Company standard iron ores properly mined, as follows:

"6,000 tons Cleveland mine hard ore @ $8.75 per ton.
"5,000 tons Norway " " @ 6.25 per ton.
"1,500 tons Rolling Mill hemalite @ 6.75 per ton.
"1,500 tons Stephenson mine @ 6.50 per ton.

"All free on board vessel at Escanaba.

"Delivery of the Cleveland ore, however, to be subject to contingencies of strikes and accidents at mines, as provided by contract between Rhodes & Bradley and owners of mine.

"The above price for ore is based upon the assumption that rail freights from mines to Escanaba will be $1.25 per ton; if more or less than that sum the excess or amount less shall be equally divided between the parties thereto.

"2d. They agree to accept and pay sight drafts of Leland Iron

Company for amount of freights on the ore as fast as earned by vessels for carrying same from Escanaba to Leland, charging the amount of said drafts as paid to the Leland Iron Company.

27 "3rd. The above ores to be furnished—1,500 tons in May, 1880, navigation permitting, and 2,500 tons each month thereafter as nearly as may be, and all to be delivered to vessel before November 1st, 1880, and in suitable quantities of each for the mixtures desired by said Rhodes & Bradley.

"4th. Rhodes & Bradley agree to purchase the entire product of pig-iron of the Leland furnace made from the ores so furnished at the rate of $40.00 per ton, cash, delivered over the rail at Chicago, or $40.25, cash, at Cleveland, at the option of said Rhodes & Bradley, they to provide proper docking facilities for prompt unloading of vessels.

"5th. Rhodes & Bradley agree to pay freight on pig-iron as earned from Leland to Chicago or Cleveland, and also the sum of $12 per ton on all pig-iron as shipped, upon sight drafts of Leland Iron Company, with bill of lading attached, both to be charged to the Leland Iron Company, the remainder of price of product to be applied in payment of purchase price of delivered ore until cost of said ore, including freights on ore to Leland, is paid.

"6th. Leland Iron Company agrees to manufacture pig-iron from said ores as nearly as practicable of the grades which said Rhodes & Bradley shall desire, and to ship same in cargo lots as rapidly as possible after manufacture during season of navigation to

28 said Rhodes & Bradley, to Chicago or Cleveland as aforesaid.

"RHODES & BRADLEY.
"LELAND IRON COMPANY,
"By V. K. MOORE, *Pres't.*
"GEO. W. MOORE, *Sec'y.*

"We hereby guarantee fulfillment of the above contract on part of L. I. Co.

"V. K. MOORE.
"GEO. W. MOORE."

29 EXHIBIT F.

Contract Between Rhodes & Bradley and the Cleveland Rolling Mill Company Sued Upon.

"This agreement, made this sixteenth day of February, A. D. 1880, by and between Rhodes & Bradley, of Chicago, Ills., and the Cleveland Rolling Mill Co., of Cleveland, Ohio, witnesseth: That said Rhodes & Bradley have sold to the said Cleveland Rolling Mill Co. the entire product of fourteen thousand (14,000) tons iron ore, to be manufactured into pig-iron with charcoal by the Leland Furnace Co., of Leland, Mich., said furnace to make as nearly all numbers one and two iron as possible, and to be shipped in vessel cargoes as rapidly as possible to the Cleveland Rolling Mill Co., at Cleveland, Ohio, during the season of navigation of 1880. Such portion of the product of said ores as is made after the close of navigation of 1880

is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible, said Cleveland Rolling Mill Co. to have the privilege of ordering the iron which may be made too late for shipment by lake during the season of 1880 through by rail to Cleveland during the winter of 1880 & 1881, they to pay the additional expense of hauling to railroad and freighting through to Cleveland by rail over and above what it would cost Rhodes & Bradley to ship by lake on the opening of
30 navigation 1881.

"Said Cleveland Rolling Mill Co. agree to receive said iron as rapidly as shipped and to pay forty-five dollars ($45) per ton (2,240 lbs.) cash for same delivered on rail of vessel at Cleveland, Ohio. The Cleveland Rolling Mill Co. are to have the option of taking a portion of the iron delivered at Chicago, Ills., at the same price and on the same terms and conditions as stated above for delivery in Cleveland, said Cleveland Rolling Mill Co. to furnish a good and suitable dock at which to unload vessels, either at Cleveland or Chicago, and to pay vessels any demurrage which they may be justly entitled to by reason of delay in furnishing a dock at which they can be discharged.

"The iron ore to be furnished at the Leland Iron Co., out of which said iron is to be manufactured, is as follows:

"6,000 tons Cleveland mine.
"5,000 " Norway "
"1,500 " Rolling Mill mine.
"1,500 " Stephenson "

"And whereas Rhodes & Bradley's contracts with said mining companies are to the effect that in case of accidents or strikes at said mines, resulting in reduced output of ore, said companies are to have the privilege of reducing the amounts due Rhodes & Bradley, as above stated, in same proportion as other sales, the said Cleveland Rolling-Mill Co. agree not to hold Rhodes & Bradley responsi-
31 ble for delivery of pig-iron beyond the product of such ores as the mining companies deliver them; also in case accidents or strikes at said Leland furnace, resulting in the stoppage of said furnace, then Rhodes & Bradley are not to be held responsible for delivery of pig-iron under the contract beyond the responsibility of the Leland Iron Co. to them, under contract between said Leland Iron Co. and Rhodes & Bradley, dated Jan. 14th, 1880, which contract, as well as Rhodes & Bradley's contracts with the mining companies, is hereby made a part of this agreement.

"RHODES & BRADLEY.
"CLEVELAND ROLLING MILL CO.
"WM. CHISHOLM, *V. Pres't.*"

Endorsed: Filed April 15, 1882. Wm. H. Bradley, clerk.

32 Afterwards, to wit, on the twenty-sixth day of September, A. D. 1882, came the defendant, by its attorneys, and filed in said clerk's office its demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

United States Circuit Court. July Term, A. D. 1882.

CHARLES D. RHODES and DAVID C. BRADLEY

vs.

THE CLEVELAND ROLLING MILL COMPANY.

And the said defendant, The Cleveland Rolling Mill Company, by Lawrence, Campbell and Lawrence, its attorneys, comes and defends, etc., when, etc., and says that the said declaration and the matters therein contained, in manner and form as the same are therein set forth, are not sufficient in law for the said plaintiffs to maintain their aforesaid action against the said defendant; and that the said defendant, The Cleveland Rolling Mill Company, is not bound by law to answer the same, and this the said defendant is ready to verify.

33 And the said defendant shows unto the court the following special causes of demurrer to the said declaration, to wit:

1. For that the said declaration does not aver that the said plaintiffs delivered 1,500 tons of iron ore in May, A. D. 1880, and 2,500 tons of iron ore in each month thereafter, and all before November, A. D. 1880, as required by said contract with the Leland Iron Company in said declaration set forth.

2. For that it appears by the said declaration that the shipments in 1881 to Cleveland began on May 20th, and continued to July 2nd, 1881, which was not in accordance with the said contract, which said contract required shipments to be made on the opening of navigation in 1881, or as near the opening as possible.

3. For that the general averment of performance by the said plaintiffs in their said declaration is uncertain, informal, and insufficient.

4. For that it appears in and by said declaration that said plaintiffs did not, on their part, observe and perform the contract between them and said defendant.

Wherefore, and for divers other good causes of demurrer appearing upon the face of said declaration, the said defendant prays

34 judgment thereof and that the said plaintiffs may be barred from having or maintaining their said action against it.

LAWRENCE, CAMPBELL AND LAWRENCE,
Attorneys for Def.

Endorsed: Filed Sept. 26, 1882. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the eighteenth day of December, in the December term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES D. RHODES *et al.*
vs.
THE CLEVELAND ROLLING MILL COMPANY.

Now come the parties, by their attorneys, and on motion of the plaintiffs, by their attorney, leave is given them to amend their declaration, and on motion of the defendant, by its attorneys, it is ordered that the demurrer on file stand to the declaration as amended, and now comes on to be heard said demurrer, and, after hearing the arguments of counsel, the court takes the same under advisement.

35 Afterwards, to wit, on the twenty-sixth day of December, A. D. 1882, came the plaintiffs, by their attorneys, and filed in said clerk's office their amended declaration in said entitled cause, which said amended declaration is in the words and figures following, to wit:

Amendment to Declaration.

United States Circuit Court, Northern District of Illinois. December Term, A. D. 1882.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
THE CLEVELAND ROLLING MILL COMPANY.
} No. 17751. No. 574.

And now come the plaintiffs, by Emery A. Storrs, their attorney, and move the court for permission to amend their declaration hitherto filed in the above-entitled cause by adding thereunto the following count, to wit:

Second Count.

And also for that whereas the said plaintiffs are residents of the State of Illinois aforesaid, and were partners and manufacturers of and dealers in pig-irons and other iron findings at, to wit, *at*
36 Chicago, in the said northern district of Illinois, at the time of the making of the contract hereinafter alluded to between said plaintiffs on the one part, and said defendants, a corporation duly organized and existing under the laws of the State of Ohio, a citizen and resident of Cleveland, in said State, on the other part.

And the said plaintiffs aver that heretofore, to wit, on the 14th day of January, 1880, they made and entered into a contract in writing, under their firm name of Rhodes and Bradley, with the Leland Iron Company, which said Leland Iron Company is a corporation organized under the laws of the State of Michigan, and engaged in the manufacture of pig-iron; and in and by said contract it was agreed between these plaintiffs and said Leland Iron Company as follows, to wit: The said plaintiffs agreed to furnish and deliver to said Leland Iron Company on board vessel at Escanaba, in the State of Michigan, fourteen thousand tons of iron ore, to be by said company manufactured into pig-iron, which said

ore was to be of the kind and qualities following, at the following-named prices, to wit: 5,000 tons Norway mine ore, at $6.25 per ton; 6,000 tons Cleveland mine ore, at $8.75 per ton; 1,500 tons rolling-mill hermadite ore, at $6.75 per ton; and 1,500 tons Stephenson mine ore, at $6.50 per ton. The delivery of said Cleveland mine ore it was, by said contract, agreed should be subject to the contingencies of strikes and accidents at the mine, as provided in a
37 certain contract between these plaintiffs and the owners of said mine; and said contract further provided that in case the freight from Escanaba should be more or less than $1.25 per ton the loss or gain on the same should be divided between said parties, and plaintiffs in said contract agreed to pay sight-drafts drawn by said iron company for amount of freight as fast as earned, and charge the same to the said iron company.

These plaintiffs in said contract also agreed to deliver 1,500 tons of said ore in May, 1880, navigation permitting, and 2,500 tons each month thereafter, as nearly as it could reasonably be done, and to deliver all of said ore to vessels before November 1st, 1880.

And plaintiffs further agreed in said contract to purchase from said Leland Iron Company the entire product of said fourteen thousand tons of ore when by it manufactured into pig-iron at and for the price of $40 per ton delivered at Chicago, in the State of Illinois, or $40.25 per ton delivered at Cleveland, in the State of Ohio, at the option of these plaintiffs; and the said Leland Iron Company by said contract further agreed to manufacture all of the ore received under the contract into pig-iron of the grade and quality desired by plaintiffs, as nearly as practicable, and to ship the same in cargo lots as rapidly as possible after manufacture to these plaintiffs at Chicago or Cleveland, at the option of plaintiffs, as aforesaid.

38 Plaintiffs further aver that after making said contract with the said Leland Iron Company as aforesaid, to wit, February 16th, 1880, they did, under the name and style of Rhodes and Bradley, make and enter into a contract in writing with the defendant, The Cleveland Rolling Mill Company, in and by which said written contract the said defendant and these plaintiffs mutually covenanted and agreed as follows—that is to say:

These plaintiffs in and by said contract sold to said defendant, and said defendant agreed to receive and pay for to these plaintiffs, the entire product of the said fourteen thousand tons of ore, to be delivered to and manufactured into pig-iron by the Leland Iron Company of Michigan, under its contract with these plaintiffs as hereinbefore set forth, which said iron these plaintiffs in said contract with defendant agreed should be manufactured with charcoal into number one and number two iron as nearly as possible, and to ship the same in vessel cargoes to the defendant at Cleveland as rapidly as possible during the season of navigation of the year 1880, and such portion of the product of said ore as was made after the close of navigation in 1880 these plaintiffs agreed to ship by vessels to Cleveland on the opening of navigation in 1881, or as near the opening of navigation as possible; and these plaintiffs further agreed that
39 the defendant should have the privilege of ordering the iron

made too late for shipment during the season of navigation in 1880 through by railroad to Cleveland during the winter of 1880 and 1881, said defendant paying the additional cost of hauling to railroad and freighting to Cleveland over and above what it would cost plaintiffs to ship by lake on opening of navigation in 1881.

And said defendant, upon its part in and by said contract, further, agreed to receive said iron as rapidly as shipped to it by plaintiffs there for the sum of forty-five dollars ($45) per ton of twenty-two hundred and forty (2,240) pounds each cash at time of delivery on said vessels at Cleveland, Ohio; and said defendant further agreed to furnish a good and sufficient dock at which to unload the vessels in which said iron was shipped, and to pay to such vessels any demurrage they might be justly entitled to by reason of delay in furnishing a dock at which said vessels could be discharged.

And it was further agreed between said parties in and by said contract that the defendant should have the option of taking a portion of said iron delivered at Chicago, Illinois, upon the same terms and conditions as hereinbefore set forth for delivery at Cleveland, Ohio; and in said contract it was further agreed and recited that as the contract of the plaintiffs with the mining companies which were to furnish the ores provided that, in case of accidents
40 or strikes at their mines resulting in reduced output or product of ore, the said companies were to have the privilege of reducing the amount of ore due to these plaintiffs in same proportion as other sales, *that* the said defendant should not hold plaintiffs liable for the delivery of pig-iron under said contract beyond the product of such ores as were delivered to plaintiffs by said mining companies.

And said defendant also in said contract agreed that in case of accidents or strikes at the furnace of the said Leland Iron Company resulting in a stoppage of said furnace, then in that case the plaintiffs were not to be held responsible for delivery of pig-iron under said contract beyond the responsibility of the said Leland Iron Company to these plaintiffs under the contract with them as hereinbefore set forth, and the said contract with the said Leland Iron Company and the contracts of plaintiffs with the said mining companies, who were to furnish ore out of which said iron was to be made, was by stipulation therein contained made part of the said contract between these plaintiffs and said defendant herein sued upon and set forth, copies of all of which the said several contracts and agreements are hereunto attached and made a part hereof, being marked "Exhibits 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,'" respectively.

41 Plaintiffs further aver that they have fully performed all and singular the agreements, covenants, and conditions in and by said contract with the said Leland Iron Company, and in and by said contract between these plaintiffs and the defendants as hereinbefore set forth by them to be performed, and have fully executed, complied with, and performed said contracts upon their part and have been at all times ready to keep and perform the same.

But the plaintiffs aver that notwithstanding the premises herein-

ore was to be of the kind and qualities following, at the following-named prices, to wit: 5,000 tons Norway mine ore, at $6.25 per ton; 6,000 tons Cleveland mine ore, at $8.75 per ton; 1,500 tons rolling-mill hermadite ore, at $6.75 per ton; and 1,500 tons Stephenson mine ore, at $6.50 per ton. The delivery of said Cleveland mine ore it was, by said contract, agreed should be subject to the contingencies of strikes and accidents at the mine, as provided in a
37 certain contract between these plaintiffs and the owners of said mine; and said contract further provided that in case the freight from Escanaba should be more or less than $1.25 per ton the loss or gain on the same should be divided between said parties, and plaintiffs in said contract agreed to pay sight-drafts drawn by said iron company for amount of freight as fast as earned, and charge the same to the said iron company.

These plaintiffs in said contract also agreed to deliver 1,500 tons of said ore in May, 1880, navigation permitting, and 2,500 tons each month thereafter, as nearly as it could reasonably be done, and to deliver all of said ore to vessels before November 1st, 1880.

And plaintiffs further agreed in said contract to purchase from said Leland Iron Company the entire product of said fourteen thousand tons of ore when by it manufactured into pig-iron at and for the price of $40 per ton delivered at Chicago, in the State of Illinois, or $40.25 per ton delivered at Cleveland, in the State of Ohio, at the option of these plaintiffs; and the said Leland Iron Company by said contract further agreed to manufacture all of the ore received under the contract into pig-iron of the grade and quality desired by plaintiffs, as nearly as practicable, and to ship the same in cargo lots as rapidly as possible after manufacture to these plaintiffs at Chicago or Cleveland, at the option of plaintiffs, as aforesaid.

38 Plaintiffs further aver that after making said contract with the said Leland Iron Company as aforesaid, to wit, February 16th, 1880, they did, under the name and style of Rhodes and Bradley, make and enter into a contract in writing with the defendant, The Cleveland Rolling Mill Company, in and by which said written contract the said defendant and these plaintiffs mutually covenanted and agreed as follows—that is to say:

These plaintiffs in and by said contract sold to said defendant, and said defendant agreed to receive and pay for to these plaintiffs, the entire product of the said fourteen thousand tons of ore, to be delivered to and manufactured into pig-iron by the Leland Iron Company of Michigan, under its contract with these plaintiffs as hereinbefore set forth, which said iron these plaintiffs in said contract with defendant agreed should be manufactured with charcoal into number one and number two iron as nearly as possible, and to ship the same in vessel cargoes to the defendant at Cleveland as rapidly as possible during the season of navigation of the year 1880, and such portion of the product of said ore as was made after the close of navigation in 1880 these plaintiffs agreed to ship by vessels to Cleveland on the opening of navigation in 1881, or as near the opening of navigation as possible; and these plaintiffs further agreed that
39 the defendant should have the privilege of ordering the iron

made too late for shipment during the season of navigation in 1880 through by railroad to Cleveland during the winter of 1880 and 1881, said defendant paying the additional cost of hauling to railroad and freighting to Cleveland over and above what it would cost plaintiffs to ship by lake on opening of navigation in 1881.

And said defendant, upon its part in and by said contract, further, agreed to receive said iron as rapidly as shipped to it by plaintiffs there for the sum of forty-five dollars ($45) per ton of twenty-two hundred and forty (2,240) pounds each cash at time of delivery on said vessels at Cleveland, Ohio; and said defendant further agreed to furnish a good and sufficient dock at which to unload the vessels in which said iron was shipped, and to pay to such vessels any demurrage they might be justly entitled to by reason of delay in furnishing a dock at which said vessels could be discharged.

And it was further agreed between said parties in and by said contract that the defendant should have the option of taking a portion of said iron delivered at Chicago, Illinois, upon the same terms and conditions as hereinbefore set forth for delivery at Cleveland, Ohio; and in said contract it was further agreed and recited that as the contract of the plaintiffs with the mining companies which were to furnish the ores provided that, in case of accidents
40 or strikes at their mines resulting in reduced output or product of ore, the said companies were to have the privilege of reducing the amount of ore due to these plaintiffs in same proportion as other sales, *that* the said defendant should not hold plaintiffs liable for the delivery of pig-iron under said contract beyond the product of such ores as were delivered to plaintiffs by said mining companies.

And said defendant also in said contract agreed that in case of accidents or strikes at the furnace of the said Leland Iron Company resulting in a stoppage of said furnace, then in that case the plaintiffs were not to be held responsible for delivery of pig-iron under said contract beyond the responsibility of the said Leland Iron Company to these plaintiffs under the contract with them as hereinbefore set forth, and the said contract with the said Leland Iron Company and the contracts of plaintiffs with the said mining companies, who were to furnish ore out of which said iron was to be made, was by stipulation therein contained made part of the said contract between these plaintiffs and said defendant herein sued upon and set forth, copies of all of which the said several contracts and agreements are hereunto attached and made a part hereof, being marked "Exhibits 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,'" respectively.

41 Plaintiffs further aver that they have fully performed all and singular the agreements, covenants, and conditions in and by said contract with the said Leland Iron Company, and in and by said contract between these plaintiffs and the defendants as hereinbefore set forth by them to be performed, and have fully executed, complied with, and performed said contracts upon their part and have been at all times ready to keep and perform the same.

But the plaintiffs aver that notwithstanding the premises herein-

above set forth, the said defendant did, in or about the month of December, A. D. 1881, notify these plaintiffs that it would not receive nor pay for any pig-iron manufactured, furnished, or tendered to it by them, in pursuance of the said contract, on or after the first day of January, A. D. 1881; and it repudiated said contract on its part and wholly refused to perform any or either of the conditions in said contract, on its part to be kept and performed, and has hitherto wholly refused and neglected, and still does refuse, to carry out said contract, to the damage of these plaintiffs in the sum of one hundred thousand dollars, and therefore they bring their suit, &c.

EMERY A. STORRS,
Att'y for Plaintiffs.

Endorsed: Filed Dec. 26, 1882. W. H. Bradley, clerk.

42 Afterwards, to wit, on the twentieth day of January, A. D. 1883, came the plaintiffs, by their attorney, and filed in said clerk's office their amendment to the original declaration in said entitled cause, which said amendment is in the words and figures following, to wit:

Amendment to Original Declaration.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

United States Circuit Court.

CHARLES D. RHODES and DAVID C. BRADLEY, Plaintiffs,
vs.
THE CLEVELAND ROLLING MILL COMPANY, Defendant.

Strike out of said declaration all after the words "pounds of iron," on the 9th page and on the 9th line from the top, down to and including the words "1,290 pounds," on the 11th page and 12th line from the top, and insert as follows in place thereof:

"And that as rapidly as the same was so manufactured, and as rapidly as possible during the season of navigation of 1880, the plaintiffs from time to time shipped the same in cargo lots as
43 provided in their contract with defendant to the defendant at Cleveland, Ohio, and up to the seventh day of May, 1881, the said defendant had received and paid for said iron and product, thirty-four hundred and twenty-two tons."

"And the said plaintiffs aver that the said iron so manufactured by them as aforesaid was shipped to the said defendant in vessel cargoes at Cleveland as rapidly as possible during the season of navigation of 1880, and was so manufactured and shipped in pursuance of said contract and as required and stipulated in and by said contract; that all said ore specified in said contract was manufactured into numbers 1 and 2 pig-iron as nearly as possible, and that 4,653 tons and 300 pounds of numbers 1 and 2 pig-iron, the product of said ore, was made after the close of navigation in 1880, and was shipped by vessel cargoes to the defendant to Cleveland on the opening of navigation in 1881, or as soon after the opening of

navigation as possible, as stipulated and required in and by said contract and in pursuance thereof."

EMERY A. STORRS,
Plaintiffs' Attorney.

Endorsed: Filed Jan. 20, 1883. W. H. Bradley, clerk.

44 Afterwards, to wit, on the thirteenth day of February, A. D. 1883, came the defendant, by its attorneys, and filed in said clerk's office its pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

United States Circuit Court. January Term, A. D. 1883.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
THE CLEVELAND ROLLING MILL COMPANY.

Now comes the said defendant, by its attorneys, Lawrence, Campbell & Lawrence, and for a plea to said declaration and the several counts thereof says that it did not undertake and promise in manner and form as set out in said declaration, and of this it puts itself upon the country.

And for a further plea in this behalf said defendant says *actio non*, because it says that the plaintiffs did not deliver fifteen hundred (1,500) tons of said ore in the month of May, 1880, and twenty-five hundred (2,500) tons each month thereafter to the said Le-
45 land Iron Company, although the navigation permitted such delivery, and this it is ready to verify.

And for a further plea in this behalf this defendant says that said plaintiffs ought not to maintain their aforesaid action against this defendant, because it says that the said plaintiffs did not duly deliver the said fourteen thousand (14,000) tons of ore mentioned in said contract with the Leland Iron Company to said iron company, as provided in said contract, as plaintiffs have averred in their said declaration, and of this it puts itself upon the country.

And this defendant, for a further plea in this behalf, says *actio non*, because it says that the said plaintiffs have not fully complied with and performed all and singular the agreements, conditions, and covenants by them to be performed under such contract with said defendant, as said plaintiffs have alleged in their said declaration, and of this it puts itself upon the country.

And for a further plea in this behalf said defendant says *actio non*, because it says that the plaintiffs did not, as they have alleged in their said declaration, ship by vessel cargoes to the defendant to Cleveland on the opening of navigation in 1881, or as soon after the opening of navigation as possible, the forty-six hundred and fifty-three (4,653) tons and three hundred (300) pounds of num-
46 bers 1 & 2 pig-iron, manufactured after the close of navigation, A. D. 1880, and of this it puts itself upon the country.

And this defendant further says *actio non*, &c., because it says that said plaintiffs have not fully performed all and singular the agreements, covenants, and conditions in and by said contract with the said Leland Iron Company and in and by said contract between said plaintiffs and the defendant, as hereinbefore set forth by them to be performed, and have not fully executed, complied with, and performed said contracts on their part, and of this the defendant puts itself upon the country.

And for a further plea in this behalf to the second count of said dec. this defendant says that it, the said defendant, did not, in or about the month of December, A. D. 1881, notify said plaintiffs that it would not receive nor pay for any pig-iron manufactured, furnished, or tendered to it by them, in pursuance of the said contract, on or after the first day of January, A. D. 1881, and did not notify said plaintiffs that it repudiated said contract on its part and wholly refused to perform any or either of the conditions in said contract on its part to be performed, and of this it puts itself upon the country.

LAWRENCE, CAMPBELL & LAWRENCE,
Att'ys for Def.

47 Endorsed: Filed Feb. 13, 1883. W. H. Bradley, clerk.

Afterwards, to wit, on the fifteenth day of February, A. D. 1883, there was filed in said clerk's office a stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States for the Northern District of Illinois.

CHARLES D. RHODES & DAVID C. BRADLEY
vs.
CLEVELAND ROLLING MILL CO.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, that the defendant shall file its pleas herein within six days from this date, and that trial by jury in this action be waived and the cause tried before the court, his honor Judge Blodgett presiding, on some day after the 10th day of March, to be fixed by the court.

February 10th, 1883.

E. A. STORRS & J. M. FLOWER,
Plaintiffs' Attorneys.

48 LAWRENCE, CAMPBELL & LAWRENCE,
Defendant's Attorneys.

Endorsed: Filed Feb'y 15, 1883. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twenty-fourth day of February, A. D. 1883, came the defendant, by its attorneys, and filed in said clerk's office its additional pleas in said entitled cause, which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court Thereof. To the December Term, A. D. 1882.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
THE CLEVELAND ROLLING MILL COMPANY.

And for a further plea in this behalf the defendant says *actio non*, etc., because it says that the said plaintiffs did not deliver to the said Leland Iron Company the said fourteen thousand tons of ore
49 in the proportions called for by their said contract with said Leland Iron Company—to wit, six thousand tons of Cleveland mine ore, five thousand tons of Norway mine ore, fifteen hundred tons of rolling-mill hematite, and fifteen hundred tons of Stephenson mine—but delivered the same in far other and different proportions, by means whereof the said Leland Iron Company was disabled from manufacturing such a quality of iron as it would have been able to do if the ore had been delivered according to the terms of said contract, and this it is ready to verify.

And for a further plea in this behalf to the second count of plaintiff's declaration this defendant says *actio non*, etc., because it says that at the time the alleged notification from said defendant to said plaintiffs—that said defendant would not receive and pay for any iron delivered on said contract after the first day of January, A. D. 1881—was given the said plaintiffs were already in default upon said contract, and had failed to perform the matters and things on their part to be performed before that time, in this, to wit, that the said plaintiffs had failed to furnish to the said Leland Iron Company fifteen hundred tons of ore in May, A. D. 1880, and twenty-five hundred tons in each month thereafter before the first day of November, A. D. 1880, and had failed to furnish the ore in the
50 quantities and proportions required by their contract with the said Leland Iron Company, which was made a part of the contract upon which the present suit is brought, and said plaintiffs had failed to perform their contract, upon which this suit is brought, in this, to wit, that by said contract the whole of said fourteen thousand tons of iron ore were to be manufactured into pig-iron with charcoal by the Leland Furnace Company, and, so far as the same was not shipped during the season of navigation in 1880, it was to be ready for shipment at the opening of navigation in 1881, and on the — day of December, at the time said notification of said defendant to said plaintiffs was given, so small a portion of said ore had been manufactured into iron that it was physically impossible for said Leland Furnace Company to manufacture the remaining amount of pig-iron due under said contract before the opening of navigation in 1881, because of the small capacity for manufacturing of the furnace of said Leland Furnace Company and the want of the requisite amount of charcoal for the manufacture of said pig-

iron, and this defendant, foreseeing the physical impossibility of the manufacture of all of said pig-iron required by said contract to be delivered on the opening of navigation, gave to said plaintiffs
the notice referred to in said declaration, for the purpose
51 of enabling said plaintiffs to save themselves from loss on
their said contract, but said plaintiffs did not accept said notice or offer of rescission on the part of said defendant, but wrongfully proceeded with the manufacture of said pig-iron, and wrongfully shipped it to said defendants at Cleveland, Ohio, long after the opening of navigation and until the second day of July, 1881, and said plaintiffs did not complete the manufacture of said iron ore called for by said contract until said month of July, 1881, all of which said defendant is ready to verify.

LAWRENCE, CAMPBELL & LAWRENCE,
Att'ys for Def.

Endorsed: Filed Feb. 24, 1883. W. H. Bradley, clerk.

52 Afterwards, to wit, on the twenty-first day of April, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
THE CLEVELAND ROLLING MILL COMPANY.

Assumpsit.

Now come the parties by their attorneys, this cause coming on for hearing upon motion of the defendant for an order appointing James F. Meagher, Esq., a commissioner for the purpose of taking depositions of Jasper Robinson, V. K. Moore, and —— Moore, and the court, being now fully advised upon the matter and having duly considered said application and the stipulation of counsel filed therewith, *the court* doth hereby order that James F. Meagher, Esq., be, and hereby is, appointed a commissioner for the purpose of taking the depositions of Jasper Robinson, V. K. Moore, and —— Moore, residents of the State of Michigan, as witnesses on behalf of the defendant; and that a *dedimus potestatum* or commission issue
53 out of the clerk's office of this court, according to law, directed
to said James F. Meagher, Esq., or to any judge, master in chancery, notary public, or justice of the peace of the county of Leelenaw and State of Michigan, to take the depositions of said witnesses upon interrogatories to be propounded orally, to be read in evidence on the part of the defendant on the trial of the above-entitled cause now pending in this honorable court.

Afterwards, to wit, on the thirty-first day of May, in the adjourned May term of said court, A. D. 1883, in the record of the proceedings

thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES D. RHODES *et al.*
vs.
THE CLEVELAND ROLLING MILL CO.

Assumpsit.

Now come the parties by their attorneys, and upon issue joined herein, by agreement of the parties, by their attorneys, they waive the intervention of a jury, and for trial put themselves upon the court, and by agreement it is ordered that all the special pleas herein be withdrawn, and that the defendant have leave to
54 make all legal defenses under the plea of the general issue; and after hearing a part of the evidence, the hour of adjournment having arrived, it is ordered that the further trial of the cause be postponed until to-morrow morning.

Afterwards, to wit, on the first day of June, in the adjourned May term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHARLES D. RHODES *et al.*
vs.
THE CLEVELAND ROLLING MILL CO.

Assumpsit.

Now, come again the parties, by their attorneys, and, after hearing the concluding evidence and the arguments of counsel herein, the court takes the same under advisement.

55 Afterwards, to wit, on the twenty-eighth day of July, A. D. 1883, there was filed in said clerk's office the special findings of the court in said entitled cause, which said special findings are in the words and figures following, to wit:

Special Findings.

Circuit Court of the United States, Northern District of Illinois.

CHARLES D. RHODES *et al. vs.* CLEVELAND ROLLING MILL COMPANY.

This cause having, by written stipulation of the parties filed in the case, been submitted to the court for trial without the intervention of a jury, and the court having heard the evidence, doth find from the evidence the following facts:

1. That the plaintiffs and defendant duly executed and delivered the contract mentioned in the declaration dated on the 16th day of

February, 1880, and that a correct copy of said contract is annexed to the said declaration and marked Exhibit F.

2. That the contract between plaintiffs and the Leland Iron Company attached to said declaration, marked "Exhibit E;" the contract between plaintiffs and the Lumberman's Mining Com-
56 pany attached to said declaration, marked "Exhibit D;" the contract between plaintiffs and the Rolling Mill mine attached to said declaration, marked Exhibit C; the contract between the plaintiffs and the Menominee Mining Company attached to said declaration and marked "Exhibit B," and the contract between plaintiffs and the Cleveland Mining Company attached to said declaration and marked "Exhibit A" were all executed by the respective parties and by persons authorized in their behalf, as the same appear.

3. That said plaintiff, between the 16th day of May and the 18th day of October, 1880, delivered to the said Leland Iron Company, at Leland, Michigan, 14,168 tons of iron ore, of which 5,980 tons were from the Cleveland mine, 4,405 tons were from the Norway mine, 1,478 tons were from the Rolling Mill mine, and 2,305 tons were from the Stephenson mine.

4. That the ores from the Stephenson mine and the ores from the Norway mine were alike in value and quality, and that Stephenson mine ore was equally as good and identical in quality and value with the ore from the Norway mine.

5. That the Leland Iron Company proceeded soon after such ores began to arrive at Leland with proper diligence to manufac-
57 ture said ores into pig-iron and shift the same in cargo lots as rapidly as possible, after manufacture, from Leland to Cleveland, Ohio, and there delivered the same to the defendant, and defendant accepted and paid for the same; that before the close of navigation for the season of 1880 said Leland Iron Company had so manufactured and delivered to defendant 3,421 tons of said pig-iron; that defendant made no objection to the acceptance of said pig-iron on said contract between plaintiffs and defendant on the ground of the quality of said iron or of undue delay in the execution of said contract.

6. That the navigation between Leland and Cleveland and Chicago closed in the fall of 1880 about the 15th of November; that the last cargo of iron was shipped from Leland on the 8th of November, and although the Leland Iron Company had enough iron manufactured to have furnished another cargo of 502 tons by the 15th of November no vessel could be obtained by which to ship it that fall; that after the close of navigation said Leland Iron Company continued the manufacture of said ore into pig-iron without unreasonable delay, and that after the 8th of November, 1880, and up to and including the 28th of February, 1881, said Leland Iron Company had made 2,100 tons of pig-iron from said ore, and by the
58 7th day of May, 1881, had manufactured and on hand ready for shipment about 3,506 tons; that on the 7th day of May, 1881, said Leland Iron Company resumed the shipment of said iron in cargo lots to defendant at Cleveland, and continued such manu-

facture and shipment in cargo lots as rapidly as possible, so that the entire product of said ore was manufactured and shipped from Leland by and including the 2d day of July, 1881; all which cargoes arrived at Cleveland in due course and were there tendered to defendant, and defendant refused to accept said pig-iron or any part thereof and refused to pay for the same; that if the average daily product of said furnace from the 8th of Nov., 1880, to the 8th of May, 1881, had been the same as the average daily product from the 18th of May to the 8th of Nov., 1880, all said 14,000 tons of ore would have been made into pig-iron by about the 10th of May, 1881; but, in fact, the furnace was shut down for a time and part of the time the blast was checked for want of a sufficient supply of charcoal, so that about 1,100 tons of said pig-iron was made after the 8th of May, 1881.

7. That in the latter part of the month of February, and again about the 3d of March, 1881, defendant notified plaintiffs that it would not accept, under said contract of February 16, 1880,
59 any iron which was made from said ore after the 31st day of December, 1880, and that some time during the month of May, 1881, defendants notified plaintiffs that it would not accept any more iron from plaintiffs under said contract.

8. That the fair market price of said pig-iron in the cities of Cleveland and Chicago during the months of March, April, May, June, and July, 1881, was $27 per ton; that the total amount of iron manufactured from said 14,000 tons of iron and shipped by the Leland Company to the defendant after the opening of navigation in the spring of 1881 was 4,579 tons, and that the difference between the market value of $27 per ton and the contract price was $18 per ton, making a total difference on 4,579 tons of ($82,422) eighty-two thousand four hundred and twenty-two dollars.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 28, 1883. W. H. Bradley, cl'k.

60 On the same day, to wit, on the twenty-eighth day of July, A. D. 1883, Judge Blodgett filed in said clerk's office his opinion in said entitled *in said entitled* cause, which said opinion is in the words and figures following, to wit:

BLODGETT *J.*:

This is a suit to recover damages for the breach of an agreement in writing made between the plaintiffs and the defendant on the sixteenth day of February, 1880, whereby plaintiffs sold to defendant the entire product of 14,000 tons of iron ore, which was to be manufactured into pig-iron with charcoal by the Leland Furnace Company of Leland, Michigan, which was to be shipped in vessel cargoes as rapidly as possible to the defendant at Cleveland, Ohio, during the season of navigation of 1880, and such portion of the product of said ore as should be made after the close of navigation of the season of 1880 was to be shipped by vessel to Cleveland on the opening of navigation for the season of 1881 or as near the

opening as possible, and for which iron the defendant agreed to pay plaintiffs $45 cash per ton of 2,240 pounds as rapidly as the same was delivered on the arrival of the vessel at Cleveland. The plaintiffs caused to be manufactured and delivered by the Leland Iron Company to defendant, in pursuance of this contract, before the close of navigation of 1880, 3,421 tons and 480 pounds of
61 pig-iron from the ore mentioned in the contract. On the twenty-third of February, 1881, defendant notified the plaintiffs that it did not recognize any contracts with the plaintiffs for pig-iron made after December 31, 1880, claiming that the contract had expired at that time; and on the first of March, 1881, defendant reiterated this notice to plaintiffs by telegraph in the following words: "Your contract to manufacture pig-metal for us gives you no authority to do so after December, 1880," and the substance of this telegram was repeated in a letter from the president of the defendant company to plaintiffs under date of March 3d.

Afterwards and about May 13, 1881, defendant offered to take the quantity of iron made prior to the first of January and which had not been shipped and which amounted to about 1,500 tons, with the understanding that they should be released from the obligations to receive any more iron under said contract. This offer was rejected by plaintiffs. Between the ninth of May and the second of July, 1881, the Leland Iron Company, for plaintiffs, shipped from Leland, Michigan, to the defendant the remainder of the iron manufactured out of said ore and tendered the same to the defendant at Cleveland, in conformity with the terms of plaintiffs' contract with the defendant, the amuont so shipped in 1881 being 4,653 tons and 390
62 pounds, which defendant refused to receive. This suit is now brought to recover damages for this alleged breach of defendant's contract.

The facts which seem to me material to the decision of this case are briefly these:

Prior to January 14, 1880, the plaintiffs had made contracts with the Cleveland Mining Company for the purchase of 6,000 tons of iron ore, to be mined from the mine of said company, and with the Menominee Mining Company for the purchase of 5,000 tons of iron ore, to be mined from what was known as the "Norway mine," owned by said Menominee Mining Company, and with the Rolling-Mill Mine Company for the purchase of 1,500 tons of ore, to be mined from the mine of said company, and with the Lumberman's Mining Company for the purchase of 1,500 tons of ore, to be mined from the "Stevenson" mine, owned by said company; all said ores to be delivered by said mining companies to plaintiffs before the first of October, 1880; and on the fourteenth of January plaintiffs entered into an agreement in writing with the Leland Iron Company, who was the owner and manager of a furnace located at Leland, Michigan, by which plaintiffs sold to said Leland Iron Company the said 6,000 tons of "Cleveland ore," 5,000 tons of "Norway ore," 1,500 tons "Rolling Mill ore," and 1,500 tons "Steven-
63 son ore," and agreed to purchase the entire product of the pig-iron to be made with charcoal from the said ores, for which

plaintiffs were to pay the said Leland Iron Company at the rate of $40 per ton, delivered over the rail at Chicago, or $40.25 per ton delivered in the same way at Cleveland, Ohio, at the option of plaintiffs, the plaintiffs to provide proper dock facilities for the prompt unloading of vessels; and the Leland Iron Company agreed to manufacture pig-iron from the said ores, as nearly as practicable, of the "grade which the plaintiffs might desire, and to ship the same, in cargo lots, as rapidly as possible after manufacture, during the season of navigation, to said plaintiffs, to Chicago or Cleveland, as aforesaid;" the plaintiffs agreeing that said ores should be delivered to the Leland Iron Company, 1,500 tons in May, 1880, and 2,500 tons each month thereafter, as nearly as may be; all to be delivered to vessels before November 1, 1880, and in suitable quantities of each for the mixture desired by said plaintiffs.

There is no doubt, from the proof, that plaintiffs commenced the shipment of ore to the Leland Iron Company as early in the season of 1880 as navigation permitted, and that between the opening of navigation, 1880, and the first day of November of that year there was delivered by the plaintiffs to the Leland Iron Company ore, in pursuance of said contract, as follows:

	Cleveland ore	5,980 tons.
64	Norway ore	4,405 "
	Rolling-Mill ore	1,478 "
	Stevenson ore	2,305 "
	Making a total of	14,168 tons.

The Leland Iron Company, in pursuance of their contract with the plaintiffs, immediately on the receipt of said ore commenced the manufacture of pig-iron therefrom, as called for by their contract, and continued to manufacture and ship said iron, so that the quantity before named of 3,421 tons and 450 pounds was manufactured and duly delivered before the close of navigation, 1880, and defendant accepted and paid for the same; that the furnace of the Leland Iron Company was run to its full capacity, and there was no delay in the manufacture of iron by the furnace, save an unavoidable delay of about six days by reason of the breaking of an elevator, and that at the time of the last shipment there was nearly a cargo of iron ready for shipment which it was intended in good faith to ship that fall, but the vessel was prevented from getting to the pier at Leland by reason of the unusually early closing of navigation that season. After the close of navigation for the season of 1880 the furnace continued the manufacture of said ore into pig-iron during the winter and ensuing spring, and on the eighth of May, 1881, and
65 from that time on until the second of July, 1881, shipments were made in cargo lots to the amount of 4,653 tons and 350 pounds of iron made from said ore so sold by plaintiffs to the iron company. The proof shows clearly that the Leland Iron Company resumed the shipment of pig-iron made from this ore in cargo lots as soon as possible after the opening of navigation in the spring

of 1881, and continued such shipment until the whole lot was shipped. It also shows that at the time of the opening of navigation the whole of the ore had not yet been manufactured, but what remained unworked at the opening of navigation was manufactured and ready for shipment as soon as the same could be readily shipped from Leland in the due course of business, after the shipment of that on hand, at the opening of navigation.

In the contract between plaintiffs and defendant it was provided "That in case of accident or strikes at the Leland furnace, resulting in the stoppage of said furnace, then the plaintiffs are not to be held responsible for the delivery of pig-iron under this contract beyond the responsibility of the Leland Iron Company to them under the contract between plaintiffs and the Leland Iron Company," and the contracts between the plaintiffs and the mining companies of whom they had purchased the ore, and the contract of the plaintiffs with the Leland Iron Company for the sale of said ore and its manufacture into pig-iron, and the purchase thereof by plaintiffs
66 from the Leland Company were made a part of the contract between the plaintiffs and defendant. The defendant now contends that the legal construction of the contract with the plaintiffs requires that all this pig-iron was to be manufactured during the year 1880, and it is upon this construction of the contract that defendant insists that it had the right to refuse to receive any iron manufactured after December 31, 1880. This construction is contended for by defendant mainly upon the last clause in the contract between the plaintiffs and the Leland Iron Company, in which the latter agrees to manufacture pig-iron from said ores "and to ship same in cargo lots as rapidly as possible after manufacturing, during season of navigation, to said Rhodes & Bradley, to Chicago or Cleveland."

While it is undoubtedly true that parol evidence is not admissible to vary or change the terms of a written contract it is frequently admissible for the purpose of ascertaining what was the intention of the parties or the meaning which they intended to attach to the expressions used in the contract. Doyle *v.* Teas, 4 Scam., 226. The proof in this case shows that while the negotiations were in progress between the plaintiffs and the defendant which resulted in the contract now in question the defendant was informed that the capacity of the Leland Iron Company's furnace was from 20 to 25 tons per day. The proof also shows that at the time this contract was
67 made this furnace had never exceeded an average product of 17½ tons per day during any year after it was built, which was in 1869. The defendant was certainly chargeable with notice as to the geographical location of Leland, Michigan, where this furnace was situated; with knowledge of the fact that it was upon the eastern shore or coast of Lake Michigan, a short distance south of the entrance to Grand Traverse Bay, and in a place comparatively difficult of access for vessels; that it had no natural or artificial harbor, but depended upon piers built out into the lake in an open roadstead.

Knowing that this iron was to be manufactured at this furnace

defendant, in my estimation, was chargeable with notice of the capacity of this furnace, or had at least sufficient notice to put it on inquiry, and that from this known capacity it was impossible for the furnace to manufacture 14,000 tons of iron ore into pig-iron between the opening and the close of navigation for the year 1880; and so also before the furnace started in the spring, but after the contract between the parties was made, the defendant was notified by letter from the plaintiffs that the managers of the furnace hoped the product would be from 25 to 30 tons per day. The language of this letter is: "We think the furnace ought to make from 25 to 30 tons per day, perhaps more; cannot tell until she gets well under
68 way; we make 50 tons at Bangor; the Leland may come up to that, as Henry Ford, who used to be at Bangor, is at Leland now." To this information as to the probable product of the furnace defendant took no exception and made no objection, and the furnace, as the proof shows, from the time it started until the close of navigation, made an average of about 22½ tons of pig-iron per day.

After the close of navigation there was at one time a suspension of about two weeks for want of charcoal, and at another occasion it ran for a time under check for want of a sufficient supply of charcoal. The proof does not show by whose fault this suspension and delay occurred, but, assuming that it was the fault of the Leland Company, it cuts so unimportant a figure in the rights of the parties that I think very little consequence should be attached to it. If there was some slight delay it could have been corperated in damages to defendant, but there is no proof that defendant sustained any damage by such delay, and, in my estimation, it furnished no valid reason why defendant should be allowed to rescind the contract. Reading the contract between the plaintiffs and the Leland Iron Company in the light of the facts, as to where this furnace was situated and its capacity, no sane man would have a right to expect that this 14,000 tons of ore would be fully manufactured into pig-iron between the middle of May and the thirty-first of De-
69 cember, 1880. The total product of this ore, in round numbers, was 8,000 tons, which, at 25 tons per day, would take 320 full working days, and it could hardly be expected that a run of that extent could be kept up for 320 consecutive working days. Allowance must be made for accidents, delays, and the failure of human calculation to some extent, of which business men making contracts for performance in the future must take some notice; and, therefore, I hold that it must have been in the contemplation of these parties at the time of making this contract that this iron could not and would not be made by or before the end of the year 1880. The words "shipped as rapidly as possible after manufacture during season of navigation," in the contract between plaintiffs and and the Leland Company, do not, in my estimation, imply of themselves that the shipment was to be made during the season of navigation of the year 1880; but, inasmuch as the Leland Iron Company was to transport this iron in vessel cargoes to Chicago or Cleveland, where the same was to be delivered to the plaintiffs, they had the

right to suspend such transportation during the suspension of navigation, so that what was not manufactured and shipped during the season of navigation of 1880 was to be manufactured afterwards and shipped during the season of navigation of the next year or years.

70 This contract between plaintiffs and defendant provided in express terms for delays by accidents or strikes at the Leland furnace, resulting in the stoppage of said furnace, and at the mines, and it may be readily imagined that a contract of this magnitude might not have been executed by reason of contingencies thus anticipated, even beyond the season of 1881. I am, therefore, of opinion that nothing in the contract between the plaintiffs and the Leland Iron Company justifies the assumption that this iron was to be all manufactured before the first of January, 1881. The terms of the contract between the plaintiffs and defendant certainly seem to have contemplated that all the iron would not be manufactured during the year of 1880. The provision is that the iron is to be shipped in vessel cargoes to the defendant at Cleveland during the season of navigation of 1880, and such portion of the product of said ore as is made after the close of navigation of 1880 is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible. Certainly this language is so used as to clearly *as to* convey the idea that the parties intended and expected that a portion of this ore would not be manufactured into pig-iron during the year 1880, and that the manufacture of what was not made and shipped before the close of navigation of 1880 was to go on and be completed and the shipments made as rapidly as possible on

71 the opening of navigation for the season of 1881. The words "as soon as possible," here used, are equivalent in their legal effect and meaning to the words "with all reasonable diligence," or "without unreasonable delay;" and there is nothing in the proof in this case to show there was any unreasonable delay; and yet, as early as January 1, 1881, the defendant, by telegram to the plaintiffs, intimates that it wishes to know the amount of iron on hand manufactured up to December 31, 1880, and the later communications from the defendant to the plaintiffs show that this information was for the purpose of enabling the defendant to take the position that it would only receive so much of such iron as was manufactured up to and including the said thirty-first day of December. There is nothing in the terms of the contract which fixes any certain or definite time within which the manufacture and delivery of this iron is to be fully accomplished. It was to be made with all reasonable dispatch by the use of the means at the command of the parties. Neither plaintiffs nor the Leland Company were bound to erect a new furnace or build vessels for the purpose of this contract.

When the defendant notified the plaintiffs, the last of February or first of March, that it would receive no iron made after the first of January, and in May gave notice that it would receive what

72 was made up to and including December 1st, on condition of being discharged from further obligation under the contract, I have no doubt that a legal breach of this contract occurred, and

the plaintiffs would have the right to treat the contract as repudiated by the defendant at that time, and plaintiffs were under no obligation to make the tender which they subsequently made of the iron. The plaintiffs, however, by their contract with the Leland Iron Company, were bound to receive this iron at Cleveland or Chicago at the price fixed in their contract, and I suppose the plaintiffs were subjected to no special inconvenience or cost in making a tender of these cargoes, as the Leland Iron Company shipped them during the months of May, June, and July, 1881. The only legal effect of this tender, after the defendant's repudiation of the contract, it seems to me, was to keep the contract alive, so far as to enable the defendant to recede from its repudiation, and accept the iron when tendered, and, perhaps, to give the defendant the benefit of any advance in the price—that is to say, if the defendant, after having given notice that it would not accept this iron, had, when these cargoes were tendered it from time to time, seen fit to accept it it would have been a good performance on both sides, and have fully condoned the breach which was committed by the defendant at an earlier day by their notice that they would not accept the iron. Defendant
73 also insists that the ore was not delivered by the plaintiffs to the furnace company in the proportion called for by the contract, defendant assuming that the ores were to be mixed for the purposes of making this pig-iron in the proportions of the quantities from the several mines, while the proof shows that there were 20 tons less "Cleveland ore" delivered than called for by the contract; 595 tons less "Norway;" 22 tons less "rolling-mill," and 805 tons more "Stevenson" than was called for by the contract. But the proof shows that the quality of the Norway and Stevenson ores was the same; that the two mines were on the same vein, and close together, so that their workings ran into each other. As one witness says, the ores of the two mines were identical in quality and value, and these two ores cost plaintiffs the same price per ton, delivered on board vessel at Escanaba. It is true that the witness Emmerton, the chemist of the Joliet Iron & Steel Company, testified that he analyzed a single sample of Stevenson ore which showed $\frac{2}{100}\frac{7}{0}$ phosphorous and 10 per cent. of silica; that he also analyzed two samples of Norway ore for phosphorous, one of which showed $\frac{2}{100}\frac{1}{0}$ phosphorous and $22\frac{1}{2}$ per cent. silica and the other showed $\frac{5}{100}\frac{3}{0}$ phosphorous. The large amount of phosphorous shown in the single sample of Stevenson ore is, in my opinion, no criterion of the average amount of phosphorous in the bulk of the ore from that mine.
The large difference in the quantity of phosphorous in the two
74 samples of Norway ore examined by this witness is a sufficient illustration of the fallacy of relying upon the analysis of a single specimen as a test of the average result of the whole product of a mine. The testimony of this witness, therefore, does not, in my estimation, establish an appreciable difference between the ores of the two mines; at least it does not overcome the affirmative testimony that the ores are essentially alike.

By the contract with the Leland Company these ores were to be mixed as directed by plaintiffs. No evidence of any direction by

plaintiffs or defendant as to the mixing of the ores is put into the case. The defendant accepted the entire quantity of ore shipped during the season of 1880 without any complaint as to the quality of the iron, and even offered to take all that had been made up to the first of January, 1881, and no objection was raised as to the quality of their iron. I therefore conclude that these slight shortages in the quantities of Cleveland and rolling mill ore are in no sense material, and, indeed, the quantities are as close as can usually be practically arrived at in the transportation by vessel cargoes of so large volumes of any commodity, and that the excess of Stevenson ore over the Norway has in no perceptible way affected the character of the product of these masses of ores, and that these facts furnish no excuse for the breach of the contract by defend-
75 ant. Undoubtedly if plaintiffs, after the notice from defendant that it would not accept any more iron on the contract, saw fit to proceed and complete the contract and tender the iron, they were bound to a substantial compliance with the terms of their contract. But I see nothing in the proof showing that they did not substantially perform their contract.

Finding, as I do, from the proof in the case, that the defendant has been guilty of a breach in its contract, the only question remaining is the measure of the plaintiffs' damages. This being a contract of sale, the obvious and natural rule of damages is the difference between the price which the defendant, by its contract, agreed to pay for this iron and the market value of the iron at the time defendant refused to perform its contract. I do not think that plaintiffs can increase or enhance the damages by the tender of performance, after the notice by defendant, on or near the first of March, that it would not accept any more iron on the contract. This was a breach by defendant which fixed the measure of its liability. The defendant knew at the time this notice was given that plaintiffs had bought this iron from the Leland Iron Company, were bound to accept and pay for it on the terms of their contract with that company, and knew, therefore, that plaintiffs would have the iron on their hands, and be compelled to dispose of it on the best terms they could if the defendant did not accept it.

76 The rights of complainant therefore seem to me the same, as to the measure of compensation, as if plaintiffs had had the iron on hand and ready to deliver, and had tendered a delivery on the first or third of March. If, however, this iron had advanced in price between the first of March and the time the plaintiff tendered it to the defendant, so as to make less difference between the contract price and the market price, the difference between the market price and the contract price at the time of the tender would be the measure of damages; but I find from the proof that there was very little difference in the price of Lake Superior iron between March and the first week in July, either in the Cleveland or Chicago markets.

This iron was not a well-known brand, having a quotable market value; it was made on contract from certain ores and had no established reputation. It may have been said to have been made for

the defendant, and the defendant only, to be used in and about the defendant's business. The proof shows that plaintiffs did not put this iron on the market and attempt to sell it until about November, 1881, and that since that time they have been diligently endeavoring to sell it, but had up to the time of the trial only succeeded in disposing of about 1,000 tons in comparatively small lots, at prices averaging about $30 per ton, but from this must be deducted expenses, such as storage, commissions for selling, etc. I do
77 not consider these sales made by plaintiffs as any standard or criterion of the value of this iron in the spring or summer of 1881. I conclude, however, that the preponderance of proof justifies me in finding that this iron could not have been sold in any of the markets for pig-iron between the first of March and the first of August, 1881, for more than a net price of $27 per ton, which, deducted from the contract price of $45 per ton, gives the difference of $18 a ton, making a total of $82,422 as the difference between the market price of the iron and the contract price on the 4,579 tons—that is to say, I assume that the product of the 14,000 tons of ore would be, in round numbers, 8,000 tons of pig-iron. Three thousand four hundred and twenty-one tons, in round numbers, were delivered in the fall of 1880, and it left 4,579 tons due on the contract after the opening of navigation in the spring of 1881. It will be remembered that there was delivered by the plaintiffs to the Leland Rolling Mill the gross quantity of 14,168 tons, and the total amount of iron manufactured was 8,074, the 74 tons being manufactured, as I assume by the proof, from the excess of ore delivered by the plaintiff- to the rolling mill company, which, of course, the defendant is not chargeable with.

Endorsed: Filed July 28, 1883. Wm. H. Bradley, clerk.

78 On the same day, to wit, on the twenty-eighth day of July, in the July term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
CLEVELAND ROLLING MILL COMPANY.

Assumpsit.

Now, on this day, come the parties, by their attorneys, and the court, having now considered and being now fully advised, finds the issues for the plaintiffs, and assesses their damages against said defendant at the sum of eighty-two thousand four hundered and twenty-two dollars; and thereupon the defendant-, by M. W. Fuller, Esq., and Messrs. Campbell and Lawrence, its attorneys, file their motion for a new trial; and the same having been heard, and the court, being advised, overrules said motion and awards judgment;

to which ruling of the court the defendants, by their said attorneys, then and there excepted.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of said defendant said sum of
79 eighty-two thousand four hundred and twenty-two dollars, their damages so as aforesaid assessed, together with their costs and charges in this behalf expended, taxed at the sum of fifty-three dollars and sixty-two cents, and that the plaintiffs have execution therefor.

80 On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record; which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
THE CLEVELAND ROLLING MILL COMPANY.

Be it remembered that the above-entitled cause coming on for trial before the Honorable Henry W. Blodgett, sitting as judge of said court, a jury having been waived by stipulation between the parties, the plaintiffs, to maintain the issues on their behalf, adduced the following evidence:

An agreement, marked "Exhibit F," between Rhodes & Bradley and the Cleveland Rolling Mill Company, bearing date the 16th day of February, 1880, in the words and figures following, to wit:

EXHIBIT F.

81 This agreement, made this sixteenth day of February, A. D. 1880, by and between Rhodes & Bradley, of Chicago, Ills., and the Cleveland Rolling Mill Co., of Cleveland, Ohio, witnesseth: That said Rhodes & Bradley have sold to the said Cleveland Rolling Mill Co. the entire product of fourteen thousand (14,000) tons iron ore to be manufactured into pig-iron with charcoal by the Leland Furnace Co. of Leland, Mich., said furnace to make as nearly all numbers one and two iron as possible, and to be shipped in vessel cargoes as rapidly as possible to the Cleveland Rolling Mill Co., at Cleveland, Ohio, during the season of navigation of 1880; such portion of the product of said ores as is made after the close of navigation of 1880 is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible, said Cleveland Rolling Mill Co. to have the privilege of ordering the iron which may be made too late for shipment by lake during the

season of 1880 through by rail to Cleveland during the winter of 1880 & 1881, they to pay the additional expense of hauling to railroad and freighting through to Cleveland by rail over and above that it would cost Rhodes & Bradley to ship by lake on the opening of navigation — 1881. Said Cleveland Rolling Mill Co. agree to receive said iron as rapidly as shipped, and to pay $45 per ton (2,240 lbs.) cash for same delivered on rail of vessel at Cleveland, Ohio.

82 The Cleveland Rolling Mill Co. are to have the option of taking a portion of the iron deliver- at Chicago, Ills., at the same price and on the same terms and conditions as stated above for delivery in Cleveland, said Cleveland Rolling Mill to furnish a good and suitable dock at which to unload vessels — any demurrage which they may justly be entitled to by reason of delay in furnishing a dock at which they can be discharged.

The iron ore to be furnished at the Leland Iron Co., out of which said iron is to be manufactured, is as follows:

6,000 tons Cleveland mine.
5,000 tons Norway mine.
1,500 tons Rolling Mill mine.
1,500 tons Stephenson mine.

And whereas Rhodes & Bradley's contracts with said mining companies are to the effect that in case of accident or strikes at said mines, resulting in reduced output of ore, said companies are to have the privilege of reducing the amount due Rhodes & Bradley as above stated in same proportion as other sales, the said Cleveland Rolling Mill Co. agree not to hold Rhodes & Bradley responsible for delivery of pig-iron beyond the product of such ores as the mining companies deliver them; also in case of accidents or strikes at said Leland Furnace resulting in stoppage of said furnace, then Rhodes & Bradley are not to be held responsible for delivery

83 of iron under this contract beyond the responsibility of the Leland Iron Co. to them under the contract between said Leland Iron Co. and Rhodes & Bradley, dated January 14th, 1880, which contract, as well as Rhodes & Bradley's contracts with the mining companies, is hereby made a part of this agreement.

RHODES & BRADLEY.
CLEVELAND ROLLING MILL CO.
WM. CHISHOLM, *V. Pres't.*

An agreement marked "E," made the 14th day of January, 1880, between Rhodes & Bradley, of Chicago, and the Leland Iron Company, of Detroit, in the words and figures following, to wit:

EXHIBIT E.

CHICAGO, *January 14th*, 1880.

Agreement made this day between Messrs. Rhodes & Bradley, of Chicago, and the Leland Iron Company, of Detroit, witnesseth:

1st. Rhodes & Bradley agree to furnish the Leland Iron Company standard iron ore, properly mined, as follows:

6,000 tons Cleveland mine ore at $8.75 per ton.
5,000 tons Norway " " $6.25 "
1,500 tons rolling-mill hematite at $6.00 per ton.
1,500 tons Stephenson mine at $6.50 per ton.

All free on board vessel at Escanaba, delivery of the Cleveland ore, however, to be subject to contingencies of strikes and accidents at mine, as provided by contract between Rhodes & Bradley and owners of mine. The above price for ore is based upon the
84 assumption that rail freights from mines to Escanaba will be $1.25 per ton. If more or less than that sum the excess or amount less shall be equally divided between the parties thereto.

2nd. They agree to accept and pay sight drafts of Leland Iron Company for amount of freights on the ores as fast as earned by vessels for carrying same from Escanaba to Leland, charging the amount of said drafts as paid to the Leland Iron Company.

3rd. The above ores to be furnished, 1,500 tons in May, 1880, navigation permitting, and 2,500 tons each month thereafter, as nearly as may be, and all to be delivered to vessel before November 1st, 1880, and in suitable quantities of each for the mixtures desired by said Rhodes & Bradley.

4th. Rhodes & Bradley agree to purchase the entire product of pig-iron of the Leland furnace made from the ores so furnished, at the rate of $40.00 per ton, cash, delivered over the rail at Chicago, or $40.25, cash, at Cleveland, at the option of said Rhodes & Bradley, they to provide proper docking facilities for prompt unloading of vessels.

5th. Rhodes & Bradley agree to pay freight on pig-iron as earned from Leland to Chicago or Cleveland and also the sum of $12 per ton on all pig-iron as shipped upon sight drafts of Leland Iron Company, with bill of lading attached, both to be charged to the Leland Iron Company, the remainder of price of product to
85 be applied in payment of purchase price of delivered ores until cost of said ore, including freights on ore to Leland, is paid.

6th. Leland Iron Company agrees to manufacture pig-iron from said ores as nearly as practical of the grades which said Rhodes & Bradley shall desire, and to ship same in cargo lots as rapidly as possible after manufacture, during season of navigation, to said Rhodes & Bradley to Chicago or Cleveland as aforesaid.

RHODES & BRADLEY.
LELAND IRON COMPANY,
By V. K. MOORE, *Pres't.*
GEORGE W. MOORE, *Sec'y.*

We hereby guarantee fulfilment of the above contract on the part of L. I. Co.

V. K. MOORE.
GEO. W. MOORE.

An agreement, marked "A," between Rhodes and Bradley and the

Cleveland iron mine, dated December 29th, 1879, in the words and figures following, to wit:

"A."

DEC. 29TH, 1879.

Messrs. Rhodes & Bradley.

GENTLEMEN: We will sell you six thousand (6,000) tons of our No. 1 ore, delivered on cars at our mines in about equal quantities monthly, from May to November next, inclusive, at six and $\frac{50}{100}$ dollars per gross ton, payable on the tenth of each month, in cash, for the ore delivered the preceding month, it being understood
86 and agreed that in case of accident at the mine or any other event which may happen there to reduce our production the above amount is to be reduced in the same proportion as our other sales.

Yours truly, FRED. A. MORSE, *Sec'ry.*

An agreement, marked "C," between Rhodes & Bradley and the Rolling Mill mine, in the words and figures following, to wit:

EXHIBIT C.

Messrs. Rhodes & Bradley, Chicago, Ills.

GENTLEMEN: I will sell you sixteen thousand and five hundred tons of Berringer hematite iron ore from the Rolling Mill mine, of standard quality, of which fifteen thousand tons is for the Joliet Steel Co. and fifteen hundred tons for the "Leland Furnace Co.," delivered on cars at said mine in about equal quantities monthly, during the season of navigation in 1880, commencing in April or May to November, inclusive, at four and $\frac{50}{100}$ dollars per gross ton, and payable on the tenth of each month, in cash, for the shipments of the preceding month, it being also understood and agreed that in case of accident at the mine or any other event that may happen to reduce the production from the mine the above amount is to be reduced in proportion as the other sales. Your acceptance of the above will be a sufficient contract between us.
87

LELAND ROLLING MILL.
GEORGE,
By —— ——,
His ——.

An agreement, marked "D," between Rhodes & Bradley and the Stephenson mine, dated the 14th day of April, 1880, in the words and figures following, to wit:

MILWAUKEE, *April 14th*, 1880.

Please to deliver to Messrs. Rhodes & Bradley, of Chicago, three thousand gross tons of iron ore from the Stephenson mine. They take the ore upon the same terms of our contract with your com-

pany. The ore delivered to them is to apply as a part of the 10,000 gross tons purchased of you.

I. M. BEAN,
Sec'ry Spring Lake Iron Co.

To H. Ludington, pres'd't of Lumberman's Mining Co.

Endorsed: "Accepted." H. Ludington, pres'd't Lumberman's Mining Co.

An agreement, marked "B," between Rhodes & Bradley and the Menominee Mining Co., dated December 26th, 1879, in the words and figures following, to wit:

EXHIBIT B.

MILWAUKEE, *Dec. 26th*, 1879.

Rhodes & Bradley, Chicago, Ills.

GENTLEMEN: The Menominee Mining Co. proposes to sell
88 you ten thousand tons [of] Norway iron ore, to be delivered f. o. b. vessels at Escanaba, in about equal quantities monthly, during season of navigation of 1880, at five and $\frac{25}{100}$ dollars per gross ton, payment for same to be made on the 15 day of the month for all ore delivered the previous month in cash.

Yours, &c., I. I. HAGERMAN, *Pres.*

[Endorsed:] Accepted.

The plaintiffs then called Charles D. Rhodes, one of the plaintiffs, who testified that Rhodes & Bradley shipped iron ore from Escanaba to the Leland Iron Company as follows:

Cleveland iron mine ore.

May	16,	1880,	198 tons.	May	27,	1880,	570 tons.
"	31,	"	536 "	June	16,	"	483 "
July	6,	"	544 "	July	9,	"	521 "
Aug.	16,	"	558 "	Aug.	24,	"	581 "
"	28,	"	143 "	Sept.	2,	"	551 "
Sept.	9,	"	569 "	Oct.	11,	"	547 "
Oct.	17,	"	159 "				

Making a total of 5,980 tons of the Cleveland mine's ore, the last delivery being October 17, 1880.

Norway mine ore.

June	15,	1880,	525 tons.	July	20,	1880,	540 tons.
July	24,	"	549 "	"	31,	"	560 "
Aug.	5,	"	509 "	Aug.	9,	"	573 "
"	12,	"	565 "	"	20,	"	574 "

Making a total of 4,405 tons of Norway ore, the last delivery being August 20th, 1880.

Rolling-mill iron ore.

	May	16, 1880,	237 tons.	Aug. 28, 1880,	427 tons.
89	Sept.	17, "	508 "	Oct. 18, "	306 "

Making a total delivery of 1,478 tons, the last delivery being October 18th, 1880.

Stephenson mine ore:

May	11, 1880,	472 tons.	June	4, 1880,	605 tons.
July	28, "	523 "	Sept.	13, "	553 "
Sept.	17, "	46 "	Sept.	18, "	106 "

Making a total of 2,305 tons of Stephenson ore, the last delivery being September 18, 1880.

The aggregate of all the iron ore delivered was 14,168 tons.

The delivery to the furnace was made as rapidly after the opening of navigation as it could be got from the ore companies. This ore was manufactured into pig-iron by the Leland Iron Company and shipped to the Cleveland Rolling Mill Company at Cleveland. The Leland Iron Company's works were located on the east shore of Lake Michigan, near the north end of the lake, at Leland, Michigan, near Grand Traverse.

The shipments of pig-iron to the Cleveland Rolling Mill Company during 1880 were as follows:

June 30th, schooner Louisa, 360 tons; July 20, schooner Gerlac, 518 tons; August 5th, schooner A. Boody, 522 tons 2,100 pounds; August 27, schooner Gerlac, 511 tons 1,618 pounds; September 23, propeller St. Paul, 600 tons; October 9, propeller Saginaw, 400 tons 1,120 pounds; November 8, propeller St. Paul, 580 tons.

That was all the iron shipped during 1880, and makes 3,421 tons 420 pounds.

90 Received telegram from Cleveland Rolling Mill Company January 1st, 1881, as follows:

"CLEVELAND, OHIO, *January 1st*, 1881.

"To Rhodes & Bradley:

"How much iron have you at the furnace for us up to and including January 3rd?"

Answered it after ascertaining amount.

February 24th, 1881, received this postal from Cleveland Rolling Mill Company:

"CLEVELAND, OHIO, *February* 23, 1881.

"Your postal of 22nd received. We do not recognize any contract with you for pig-iron made after December 31st last, the old contract having expired at that time.

"Yours, respectfully,

"THE CLEVELAND ROLLING MILL CO.,

"By H. W. B."

Received March 1st the following telegram:

"CLEVELAND, OHIO, *March 1st.*

"To Rhodes & Bradley:

"Your contract to manufacture pig-metal for us gives you no authority to do so after December 31st, 1880."

Received May 12th, 1881, this telegram:

"CLEVELAND, OHIO, *May 12th.*

"Propeller Norman reports to us this morning with pig-metal. We long since notified you that no more iron would be received from you by us. Please give orders for the disposal of the iron."

May 13th, 1881, received the following telegram:

"CLEVELAND, OHIO, *May 13th.*

"To Rhodes & Bradley:

91 "We will take that 1,500 tons made January 1st with the understanding that the entire balance is declared off, and that is the only way we will agree to it."

The iron shipped during the year of 1880 was paid for by defendant. No objections were made as to the quality of the iron shipped. No objections were made as to the kinds of ores from which it was manufactured prior to the time suit was brought against defendant at Cleveland. Defendants have not paid for any more than the iron delivered in 1880. They declined to receive the balance of the iron.

Letters from Rhodes & Bradley to Cleveland Rolling Mill Company of May 14th, June 8th, and June 11th, 1880, and from Cleveland Rolling Mill Co. to Rhodes & Bradley, dated June 9th, 1880, were put in evidence by plaintiffs, and are as follows:

"CHICAGO, *May 14th*, 1880.

"William Chisholm, Esq., vice-president of the Cleveland Rolling Mill Company.

"DEAR SIR: We have your favor of the 13th inst. The Leland furnace has been delayed some in getting in blast, but we suppose she is lighted by this time; if not she will be within a day or two. We expect to be able to ship you a small cargo about the 1st prox. We expect she will make mostly Nos. 1 and 2. If you want some of the higher numbers we will make an effort to make some

92 for you. We shall probably make some high iron any way.

"Yours truly, RHODES & BRADLEY.

"We think the furnace ought to make 25 to 30 tons per day, perhaps more. Can't tell until she gets well under way. We make 50 tons at Bangor, and Leland may come up to that, as Henry Ford, who used to be in Bangor, is in charge at Leland."

"CHICAGO, *June 8th*, 1880.

"Leland Rolling Mill Company, Cleveland.

"GENTLEMEN: We have report from Leland furnace, dated 5th

inst., showing on hand there 210 and ½ tons number one, 88 and ½ tons number 2, and 17 and ¾ number 3—total, 316¾ tons—and she is making now about 25 tons per day, so they will be able to ship you first cargo early next week.

"Yours truly, RHODES & BRADLEY."

"CLEVELAND, *June 9th*, 1880.

"Messrs. Rhodes & Bradley, Chicago.

"GENTLEMEN: As the Cleveland Iron Mining Co. have reduced price of ore to all their customers $3.00 per ton, we call upon you to make us a proportionate reduction on our contract with you for charcoal pig-iron. Owing to the very high price made in the
93 contract we hope you will not consider the request unreasonable, and that you will give it careful consideration.

"In shipping iron to us please be very careful that all the pigs are branded in such a way as to show the grade plainly, and make us as much of the high grades as possible.

"Truly yours.

"CLEVELAND ROLLING MILL CO.
"H. W. B."

"CHICAGO, *June 11th*, 1880.

"Cleveland Rolling Mill Company.

"GENTLEMEN: We have your favor of 9th inst. If the Cleveland Iron Mining Company will make us any reduction on the ore we bought for Leland furnace, we shall be very happy to make a corresponding reduction to you. We bought the ores before the big advance and contracted with the Leland Iron Company to furnish them ores and take their iron at a price based on the price at which we bought the ores and sold you the iron based on the price we were to pay the Leland Iron Company. We make no extravagant profit and get no reductions on any of the ores or on the price we pay for the pig-iron, nor can we get any. At the time we sold you the iron the price was nominally $55, instead of $45, as we sold you at. We closed the trade with you so as to feel sure of having
94 placed the product with good parties at a reasonable profit. We refuse to sell Bangor at $5; 1 at the same time declined a positive offer at that price. We had this matter all over with Mr. William Chisholm in person, and he admitted that as we got no deduction on the ores we could — be expected to make any deduction in price of iron. As to the truth of this statement that we get no deduction, we refer you to the ore companies themselves. We note your request as to marking and grading iron and will do our best to please you.

"Yours truly, RHODES & BRADLEY."

Mr. Rhodes testified [that] Wm. Chisholm was vice-president at the time the contract was made, and Henry Chisholm, his father, was president of the Cleveland Rolling Mill Company, and [of] which Wm. Chisholm is now president.

On cross-examination Mr. Rhodes testified that pig-iron was sent in 1881 to Cleveland, as follows:

May 8th, propeller Norman, 554 tons 610 pounds; May 16, schooner Monticello, 583 tons 740 pounds; May 20th, propeller Norman, 590 tons 500 pounds; May 24th, schooner Wilcox, 697 tons 1,390 pounds; June 4th, schooner King, 557 tons 2,120 pounds; June 8th, propeller Norman, 594 tons 1,507 pounds; June 23rd, propeller Norman, 590 tons 630 pounds; July 2nd, propeller Norman, 484 tons 1,790 pounds; making a total of 4,653 tons 390 pounds.

The dates given are the dates of shipment from Leland.

95 The dates of shipment of ore to Leland are dates of shipment at Escanaba. It takes one to three days for a vessel to come across, according to the weather.

The postal of defendant was in answer to a postal from us sent February 22nd, showing the amount of pig-iron on hand at the furnace; that was the first one sent. After that we sent them one each week. The letter of May 14th, 1880, was in answer to a letter from defendant, as follows:

"CLEVELAND, OHIO, *May 13th*, 1880.

"Messrs. Rhodes & Bradley:

"GENTS: How soon will you be making iron upon our contract, and at what rate do you expect to make it? Can you tell about the Nos. that you make?

"Yours truly, WM. CHISHOLM."

Ford had run the Bangor furnace up to 50 tons two or three days of a year possibly; that furnace was larger than Leland.

Plaintiffs called as a witness DAVID C. BRADLEY, one of the plaintiffs.

The plaintiffs propounded to said witness the following question:

Q. "Do you know whether Mr. Wm. Chisholm had any knowledge or information as to the capacity of the Leland furnace at or about the time this contract was made?"

Objected to by defendant. Objection overruled by the court; to which ruling and decision of the court the defendant then
96 and there duly excepted.

The COURT: State what knowledge you have.

A. It was in making this contract. It was talked over what the capacity of the furnace was.

Mr. STORRS: Talked over with you?

A. Yes.

Q. State to the court that conversation, if you please.

To which question the defendant then and there objected, but the court overruled the objection; to which decision of the court the defendant then excepted.

Q. State what that conversation was, Mr. Bradley.

A. In general conversation the question, of course, was asked about what the probable capacity of the furnace would be, and it was stated to him that it would be from 20 to 25 tons per day, as well as we could state anything of that kind. A blast furnace is different from almost anything else."

The furnace at Leland is a charcoal blast furnace. This conversation with Mr. Chisholm was on Friday, and that contract was signed on the Monday after. Improvements and repairs were being made on the furnace with a view of increasing the capacity.

The plaintiffs called V. K. Moore, who testified that he had been president and manager of the Leland Iron Company since 1879.

Plaintiffs propounded the following question:

"You may describe to the court now the situation of that furnace, its general character and capacity, its facilities, etc., as
97 they were in 1880."

This question the defendant objected to, but the court permitted it to be asked subject to the objection. The witness testified the furnace is situated on the east shore of Lake Michigan, about 30 or 40 miles south of the straits. It manufactures hematite pig-iron with the use of charcoal. The shore of the lake is an open shore; there is no harbor there. There is a bridge pier reaching out from the main land into the lake 700 or 800 feet, possibly less, from the furnace 20 feet wide at the main part and 35 or 40 feet at the extreme end. The average capacity for the manufacture of pig iron from May 1st to November 1st, 1880, was 22 and ½ tons a day; no other way of determining capacity than by experience.

The last blast before was in 1877; ran it as manager in 1876 and 1877.

To the witness proceeding the defendant objected, but the court received the testimony subject to the objection.

Witness said the blast in 1876 averaged 17 tons a day, and in 1877 17½ tons. The furnace fired up May 19th, 1880. Between May 19th and the close of navigation the furnace was not at any time short of ore.

This evidence was objected to by defendant, but received subject to objection.

From the commencement of operations down to the close of navigation of 1880 there was no lack of charcoal at the fur-
98 nace. In 1880 vessels were chartered for the shipment of iron at different times as they could be got. When the cargo was ready to ship the company made a charter. When a vessel was expected we got out as much iron as we dared put on the pier at one time. Our only method of handling was with teams and wagons over this bridge pier. It was put there as fast as was necessary to provide for the vessels. Navigation closed in 1880 about November 15th. The last shipment made by us to Cleveland that year was November 8th. We had on the dock something over 400 tons of iron when navigation closed. There were times when boats could not get into the pier; sometimes lay outside for a week; sometimes would be driven away after commencing loading. The last cargo of

November 8th was short on that account. We had on hand at the opening of navigation in 1881, May 7th, 3,566 tons; made arrangements during the spring of 1881 for transportation of iron, making it on our previous experience of vessels arriving about a week apart; that was about as fast as I dared have the boats come in. At the commencement of navigation in 1881, 1,143 or 1,148 tons of the iron contemplated by the contract was left unmanufactured.

Q. Suppose that the whole amount had been actually manufactured on the opening of navigation, 1881, could it have been
99 shipped forward to Cleveland any more rapidly than you did?

Question objected to [by] def't's att'y.

The COURT: The question is whether the fact that some of this ore had not been manufactured up to the opening of navigation, 1881, was a factor or element in the delay. It may or may not be; I cannot tell at present. The question may be answered.

Def't's — excepts.

The WITNESS: Well, there were seven cargoes shipped out between the two times, between May 7th.

Mr. FULLER: Shipped out when?

A. Between May 7th and July 7th.

Mr. CUSHING: Seven cargoes?

A. Yes.

Mr. STORRS: Go on.

A. And that would require in the ordinary expectation of loading at that point.

Q. That is not quite in answer to the question, yet furnishes a means of reaching a conclusion, but is not an answer to the question. Suppose that the whole amount had been actually manufactured on the opening of navigation, 1881, could it have been shipped forward to Cleveland any more rapidly than you did?

A. Well, I don't know; that was as fast as we shipped it.

Q. What is that?

A. That is as fast as we shipped it. It depends altogether on the weather and incidentals.

Q. Were there any delays in the shipment in consequence of not having the whole amount manufactured and ready for shipment at the opening of navigation in 1881?

100 A. Any delays in the shipment?

Q. Yes.

A. Well, I don't know that I can answer that question in that way. For instance, we had provided for our transportation in a certain manner—for vessels to come, as near as practicable, a week apart—based upon our previous experience, and the average was a little over one vessel a week, one cargo a week.

Q. Well, you had 3,500 tons to start with, and you made your last shipment on the 29th of June?

A. The 2nd of July.

Q. The 2nd of July or the 29th of June?

A. Well, we got through making it the 29th of June.

Q. Suppose it had all been manufactured at the opening of navi-

gation, would you have made any different arrangements than you did?

A. No, sir; I should not. That is the point.

Q. Yes; that is the point.

Mr. CUSHING: How is that material?

Mr. FULLER: It is all under objection.

WITNESS continued: We had hauled as high as 150 tons a day onto the pier, and it would take a day or two to load a vessel. When vessels were not waiting we hauled at our convenience. We did not consider it entirely safe to put over 450 or 475 tons on the pier at one time. The largest cargo we shipped was 700.

On cross-examination the witness testified that the furnace was not short of charcoal up to November 8th, 1880, short at times during the winter months and in March & April, and ran under a check part of the time by reason of the short supply of charcoal.

101 Witness produced the record of the production of the furnace from May 19th, 1880, to July 2nd, 1881, and from that record made the following abstract of the daily production, to wit:

1880. Week ending—			1881. Week ending—	
May 22	4		Jan. 1	116
" 29	149.3		" 8	115.2
June 5	163		" 15	122
" 12	140.2		" 22	146
" 19	146.2		" 29	146
" 26	170		Feb. 5	144.2
July 3	184.1		" 12	129
" 10	62.1	Elevator broken; shut down 6th to 12th, 6½ days.	" 19	121
			" 26	116
" 17	96		M'ch 5	111.2
" 24	167.2		" 12	109
" 31	168		" 19	112.2
Aug. 7	165		" 26	110
" 14	148.2		Apr. 1	90
" 21	144.2		Shut down to 19th.	
" 28	164.2		Apr. 23	55.2
Sept. 4	164		" 30	122.2
" 11	172.2		May 7	172
			14	162.2

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" 18	180.2	21	133
" 25	180.2	28	143
Oct. 2	181.2	June 4	171
9	183.2	11	172
16	186	18	168
23	186	25	172
30	182.2	30	100½

Nov. 6	187
13	181
20	146
27	132
Dec. 4	136.2
11	142
18	138.2
25	135

And also from the record made the following abstract of the numbers of the iron produced, to wit:

	1.	2.	3.	4.	5.
May 23	108	4			
" 29	108	29.2	12.1		
June 5	102.2	55	5.2		
" 12	113.2	15.2	11.2		
" 19	141	5.2			
" 26	86	35.2	43	5.2	
July 3	42	41	58	38.1	5
" 6	28	7	20	7.1	
" 17	22.2	25	37.1	10.2	1
" 24	100	56.2	11		
" 31	96.2	40.2	31		
Aug. 7	58.2	99.2	7		
" 14	75.2	39	34		
" 21	97.2	41	6		
103					
" 28	117.2	41	----	6	
Sept. 4	129	30	5		
" 11	124	48.2			
" 18	62	105	13.2		
" 28	57	92.2	25	5.3	
Oct. 2	31.2	106	20.2	7.2	16
" 9	32	99.2	46	----	6
" 16	6	51.2	115.2	13	
" 23	12.2	93.2	73.2	6.2	
" 30	18.2	92	57	15	
Nov. 6	----	102	60.2	15.2	9
13	----	38.2	127	12.2	3.2
20	37.2	90	18.2		
27	67.2	53	11.2		
Dec. 4	102	28	6.2		
11	6	75.2	60.2		
18	19	66	53.2		
25	31.2	60	43.2		
Jan. 1	64	41	11		
8	54	34.2	26.2		
15	15.2	14	65.2	14	13
22	43.2	26	76.2		
29	21	30	95		

Feb.	5----	----	----	121.2	23	
	12----	----	7.2	12.2		
	19----	----	33	88		
	26----	18.2	8.2	89		
		1.	2.	3.	4.	5.
M'ch	5----	55.2	36	20		
"	12----	23.2	78.2	7		
"	19----	79	24.2	9		
"	26----	31.2	78.2			
Apr.	1----	74.2	15.2			
"	23----	55.2				
"	30----	115	7.2			
May	7----	51.2	73.2	41	6	
"	14----	58.2	60.2	17	22.2	4
"	21----	32.2	71.2	29		
"	28----	66.2	36	34	6.2	
June	4----	40.2	107.2	23		
"	17----	87	76.2	8.2		
"	18----	51	76	26.2	14.2	
"	25----	72.2	32.2	60.2	6.2	
"	30----	51.2	7	25.2	10	6.2

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This record also gave the proportion of ores put into the furnace, and ran as follows: For week ending Jan. 15th, 1881: Cleveland, 99 tons; Norway, 64; Stephenson, 27; Rolling Mill, 27. For week ending January 22: Cleveland, 114; Norway, 70; Stephenson, 24; Rolling Mill, 31. For week ending February 12: Cleveland, 99; Norway, 4; Stephenson, 27; Rolling Mill, 27. For week ending February 19: Cleveland, 95; Norway, 62; Stephenson, 26; Rolling Mill, 26. For week ending March 12: Cleveland, 87; Norway, 52; Stephenson, 24; Rolling Mill, 24. For week ending March 19th: Cleveland, 90; Norway, 57; Stephenson, 25; Rolling Mill, 25. For week ending May 21: Cleveland, 92; Norway, 79; Stephenson, 29; Rolling Mill, 29. For week ending May 28: Cleveland, 102; Norway, 87; Stephenson, 34; Rolling Mill, 34.

105 The furnace made its own charcoal. Navigation opened in the spring of 1881, May 7th. Witness chartered the vessels for bringing the ore; arranged to have it come as fast as it could. Navigation closed unusually early in the fall of 1880. The first cargo of ore in 1880 was received May 12th; expected to start, but some of the machinery was delayed and we didn't get it into place until a little later; could not run without it. We commenced filling the furnace May 18th, and fired up on the 19th; the first iron was out on the 22nd. The furnace company owned the pier. The furnace was stopped in July, 1880—six days and a half—when an elevator gave out, besides the time that I have mentioned.

On redirect examination the witness said the winter of '80 and '81 was very severe; the snow was deep, and it was with the utmost difficulty that the company was able to haul its coal.

Plaintiffs put in evidence letters from plaintiffs to defendants as follows:

"JANUARY 3RD, 1881.

"Cleveland Rolling Mill Co.

"GENTLEMEN: In reply to your telegram of Saturday we have wired you that there is about 1,582 tons iron on hand for you at Leland, up to and including December 31st. Please excuse delay in answering, but Saturday and yesterday business did not get much attention and we just got an answer to our telegram to furnace.

"Yours truly, RHODES & BRADLEY."

106 "FEBRUARY 24TH, 1881.

"Same to same.

"Cleveland Rolling Mill Company.

"GENTLEMEN: We have your postal card of 23rd inst. saying that you do not recognize any contract with us for pig-iron made after December 31st last. Please advise us on what ground you make such a claim. The contract reads that you are to take the product of 14 M tons ore, and such portion of it as is made after the close of navigation, 1880, is to be shipped as near the opening of navigation as possible, etc. We trust that you will favor us with a reply, and oblige,

"Yours truly, RHODES & BRADLEY."

"MARCH 1ST, 1881.

"Same to same.

"We have have your telegram of this date as follows: 'Your contract to manufacture pig-metal for us gives you no authority to do so after December 31st, 1880.' This does not say anything more than your postal card of 23rd ult., and it is so directly contrary to what the contract does authorize us to do that we can only think that you have not read it carefully lately; but Mr. William Chisholm knows well what the contract was without reading it, and we should like to hear from him on the subject with any valid reason why you should not take the entire product of the 14,000 tons ore, as agreed. Hoping for an early reply, we are,

107 "Respectfully yours, RHODES & BRADLEY."

"MARCH 5TH, 1881.

"Same to Henry Chisholm, Esq., president of the Cleveland Rolling Company, Cleveland, Ohio.

"DEAR SIR: We have your favor of 3rd inst. and have simply to reply that we shall hold your company under the terms of your contract dated February 16th, 1880, to receive and pay for the entire product of the 14,000 tons iron ore therein specified. We regret this difference of opinion, but we know we sold you the entire product of the 14,000 tons, and neither we -or our attorneys, among the ablest in the city, can discover any flaw in the contract.

"Yours respectfully, RHODES & BRADLEY."

"MAY 11TH, 1881.

"Cleveland Rolling Mill Company, Cleveland, Ohio.

"GENTLEMEN: We enclose bill of lading and invoice for 560 tons Leland iron per prop. Norman.

"Yours truly, RHODES & BRADLEY."

The plaintiffs read in evidence the deposition of Nelson P. Holst, the evidence tending to show that the ore in the Norway and Stephenson mines was identical in quality and value.

Charles T. Steward testified for plaintiffs that he was engaged in the sale of pig-iron at Cleveland and was conversant in June
108 and July, 1881, with the standard values of pig-iron in the Cleveland market; had heard some of those who used this iron speak of its qualities; saw a little of it.

Q. What was the value of well-known brands of pig-iron in Cleveland in June and July, 1881?

To this question the defendant objected, but the court overruled the objection; to which decision and ruling of the court the defendant, by its counsel, then and there excepted.

The witness answered: Depending on the grade of the iron, from $30 to $32; numbers 2, 3, and 4 were worth more than number one, from $1 to $2 per ton; the difference between well known brands of charcoal-iron and those not well known was from $2 to $4; the product of the Leland Iron Company was not a well-known brand in the Cleveland market; putting 4,500 tons of an unknown brand of iron on the market at one time wauld have a tendency to break the price; the selling value would depend somewhat upon what its quality was; if it was suited to make Bessemer it would bring one price; if to make malleable iron another price; if to make car-wheels another price; if not suited for any of these purposes another price; from my knowledge of this iron I don't see that it could have been used for wheels, malleable castings, or agricultural castings; possibly it might have been used and sold in the manufacture of Bessemer steel; however, that is a matter of analysis, and I have never
109 seen an analysis of the metal.

The following question was put to the witness:

Q. If the iron in question, Mr. Stewart, had been placed in your hands as an iron merchant or a commission merchant for sale to what class of trade would you naturally have attempted to dispose of it?

To this question the defendant objected, but the court overruled the objection, and the defendant, by its counsel, then and there duly excepted.

The witness answered: Numbers 2, 3, 4, 5, and 6, if there were any, I should have endeavored to sell to the malleable iron and car-wheel trade; number 1 to the agricultural trade or the malleable trade; had seen the iron in the yards of several consumers of pig-iron in Cleveland; assumed it to be this iron from what I was told;

all the knowledge I had in regard to the iron was what I was told; the Bessemer trade will not accept iron that has over ten per cent. in phosphorus; they want it as much lower as they can get it; have not seen an analysis of this iron; was worth from $27 to $28 in January, 1881, and so on to midsummer.

Harvey H. Brown testified to the same effect. Mr. Rhodes, being recalled, testified that the Stephenson ore was bought for $4 per ton, cash, at the mine; the Norway ore for $5.25, 4 months on vessel at Escanaba. The freight from both, the Norway and the Stephenson,
was $1.25. That would make the Norway ore and the Stephen-
110 son ore exactly the same price at the mine, except that we pay cash for the Stephenson, and the Norway we bought at 4 months. This iron was to be a brand that could be used for Bessemer purposes to a limited extent, to make Bessemer rails alone, as I understand; it was that mixture of ore that we contracted for exactly, for Bessemer purposes. We make no guarantee as to the phosphorus or anything of that kind; did not attempt to sell any of this iron until after the trial at Cleveland, in November, 1881. Shortly after a new trial was granted to the plaintiffs we instructed Rhodes & Co., at Cleveland, to sell the iron at the best advantage they could. Up to the time of that trial we had been holding it to the order of the Cleveland Rolling Mill Company as soon as they should pay for it. That suit was for the whole amount of the contract price; and if they paid the full contract price they could get the iron subject to the charges.

Mr. Bradley, being recalled, said that he had an analysis of iron made within the last two months, which showed it contained between $\frac{13}{100}$ and $\frac{14}{100}$ of one per cent. of phosphorus, which was above the usual per cent. for Bessemer purposes.

The Norway and Stephenson mines are as close together as two holes can be and not be one. The case at Cleveland was tried in October or November, 1881.

The plaintiffs rested; and the defendant, to maintain the
111 issues on its behalf, offered the following evidence:

Frederick A. Emmerson, chemist and analyzer of ores, analyzed Stephenson ore and Norway ore. The Norway ore would make iron with phosphorus with less than one-tenth of one per cent., while Stephenson would make iron about sixteen one-hundreths of one per cent. of phosphorus; duly examined one sample of Stephenson and two samples of Norway; there was a difference of one 20-hundredths of one per cent. in the amount of phosphorus in those two samples of Norway ore.

The depositions of William H. Harvey and John U. Glidden were read on behalf of the defendant, the evidence tending to show that the ore in Stephenson and Norway mines was not identical.

The defendant called William Chisholm, president of the defendant company, who was vice-president at the time the contract was made. Mr. Bradley was the active man in making it. Mr. Bradley came to Cleveland to see witnss with reference to selling the iron if possible. The interview was between Mr. Bradley, witness, and Henry Chisholm, who was then the president and who is now dead.

The agreement was arrived at at that interview and closed up with the exception of signing the contract, which was done at Chicago a few days after. There was no talk between the witness and Bradley at Chicago. The contract had been drawn up in the meantime and was ready for signature, and witness signed it. Neither at Cleveland nor Chicago during any of the negotiations leading up to the execution of the contract was anything said by Mr. Bradley to witness or by anybody else to witness about the
112 capacity of the Leland furnace or of its expected capacity; nothing was said about it nor about the expected daily output. Witness did not know what the capacity of the Leland furnace, or its expected capacity, was. Mr. Bradley did not at any time before the signing of the contract state to witness that the probable capacity of the furnace would be 20 or 25 tons a day or anything of that kind. The first statement made by Rhodes & Bradley about the capacity of that furnace or by Mr. Bradley was in the letter of May 14th, 1880. The first time defendant knew of the discrepancy in the delivery of the ores, particularly the Norway and the Stephenson, at Leland, was during the trial of the case brought at Cleveland. Prior to that time no knowledge of the differences in the quantities of the ores had come to me or of the difference in the proportion in which the ores were mixed. The letter of May 13th to Rhodes & Bradley was written by witness, and the answer to it of May 14th was witness' first information upon the subject of the supposed capacity. Witness resided in Chicago 17 years prior to going to Cleveland; was vice-president and general manager of the Union Rolling Mill Company, and was familiar with the iron market in Chicago as well as in Cleveland. Chicago is a better market than Cleveland, because there is more sold in large quantities of that class of metal. The distance from Chicago to Pennsylvania,
113 where most Bessemer iron is manufactured, has something to do with making this a better market for Bessemer purposes. There was no sale in Cleveland for that class of iron for Bessemer purposes, because the Bessemer works there supplied themselves.

The defendant then introduced in evidence daily market quotations of Lake Superior charcoal pig-iron from the Chicago Tribune, at Chicago, and from the Iron Age, at Cleveland and Chicago, as follows:

Chicago Tribune Quotations [of] Lake Superior Charcoal Pig-iron.

1881, Jan. 1st.—Nos. 1 and 2, $33.00; No. 3, $34.00; Nos. 4, 5, and 6, $35.00.

Jan. 5th, 7th, 10th, 12th, 21st, 26th to 29th, quotations the same.

Dec. 7th.—Nos. 1 and 2, $30.50 to $31.00; No. 3, $32 to $32.50; Nos. 4, 5, and 6, $33.00 to $34.00.

1882, Jan. 4th.—Nos. 1 and 2, $31.00; No. 3, $33.00; Nos. 4, 5, and 6, $34.00 to $35.00.

Jan. 11th.—Quotations same; Jan. 18th, quotations same.

Iron Age Quotations [of] Lake Superior Charcoal Pig-iron.

Chicago.	Cleveland.
	Jan. 3rd, 1881.—Charcoal pig is selling at $33 to $36, according to grade.
Jan. 27th, 1881.—Lake Superior charcoal: 1 and 2, $32.00; 3, $33.00; 4, 5, and 6, $34.00.	Jan. 27th.—Charcoal sheet metal is in excellent demand with prices firm at $33.00 to $35.00 here.

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Feb.	3rd.	Quotations the same.	
"	10th.	"	"
"	17th.	"	"
"	24th.	"	"
May	5th.	"	"
"	12th.	"	"
"	19th.	"	"
"	26th.	"	"

May 5th.—There is no disposition on the part of producers to cut prices as yet; furnace men, on the contrary, claim they cannot live and sell metal at market prices unless ore is sold at less figure.

Dec. 1st. 1881:
Lake Superior charcoal.
1 and 2, $31.00.
3, $32.00.
4, 5, and 6, $33.00 to $34.00.
All December quotations remained the same.

This was all the evidence offered by either party in the case, whereupon the defendant moved the court to exclude plaintiffs' evidence under the first count of the declaration upon the ground of variance between the contract of Rhodes & Bradley with the Leland Iron Company, as set up in that count, and the contract offered in evidence, but the court overruled said motion and gave the plaintiffs leave to amend; to which defendant then and there duly excepted. The defendant also moved the court to exclude plaintiffs' evidence upon the ground of variance, in that plaintiffs' evidence tended to establish ex-
115 cuses for non-performance instead of tending to show performance; but the court overruled, said motion and defendant then and there duly excepted. The defendant also moved to exclude the evidence of Mr. Bradley as to alleged conversations with William Chisholm in regard to the capacity of the Leland furnace prior to the execution of the contract between plaintiffs and defendant; but the court overruled said motion, and defendant then and there duly excepted. The defendant also moved to exclude all the evidence offered as to the capacity and situation of the furnace of the Leland Iron Company; but the court overruled the motion and the defendant then and there duly excepted.

The defendant also asked the court to make the following special findings, to wit:

1st. That all the iron manufactured after January 1st, 1881, was not manufactured within the time required upon the true construction of the contract. This amounted to, say, 3,100 tons.

2nd. That the defendant did not take the risk of the capacity of the Leland furnace.

3rd. That the 14,000 tons of ore was delivered to the furnace on and prior to the 18th of October, 1880.

4th. That navigation opened on the 7th of May, 1881, and at that time there was 1,222 tons of iron unmanufactured; that the Leland made its own charcoal, and that from the 18th of December, 1880, to the 23rd of April, 1881, the blast was checked and the furnace shut down for want of charcoal, and the result was that the furnace turned out 1,222 tons of iron less than it otherwise would.

116 5th. That the amounts of the different ores from which the iron was contracted to be manufactured were contracted to be as follows: 6,000 tons of Cleveland, 5,000 tons of Norway, 1,500 tons of Rolling Mill, 1,500 tons of Stephenson, and that the amounts of ore delivered were: Cleveland, 5,980 tons; Norway, 4,405 tons; Stephenson, 2,305 tons; Rolling-Mill, 1,478 tons; that the amount of phosphorus in Stephenson exceeded the amount of phosphorus in Norway; that the iron was desired by defendant for Bessemer purposes, to the knowledge of plaintiffs, but contained so large an amount of phosphorus as to be unfit for those purposes.

6th. That the plaintiffs cannot recover under the second count.

7th. That the iron manufactured after the first of November, 1880, was not shipped on the opening of navigation of 1881, or as near the opening as possible.

8th. That the iron shipped June 4th, June 8th, June 23rd, and July 2nd, 1881, amounted to 2,227 tons 1,567 pounds, and was not shipped as near the opening of navigation of 1881 as possible.

9th. That the defendant was not bound to take more than the 1,500 tons on hand January 1st, 1881.

10th. That upon the evidence under the contract sued on the defendant was not bound to take any of the iron after the shipment of November 8th, 1880, and the plaintiffs cannot therefore recover.

But the court refused to specially find as requested in each instance; to which refusal the defendant excepted, but the court made the special findings signed by the court and filed herein, to which special findings so made by the court, and each of them, the defendant duly excepted.

117 The court thereupon found for the plaintiffs and assesses the damages at $82,422.00, the amount named in the record; whereupon the defendant entered its motion for a new trial in the words and figures following, to wit:

118 *Motion for New Trial.*

In U. S. Cir. C't, Nor. Dist. of Ill.

CHAS. D. RHODES *et al. vs.* THE CLEVELAND ROLLING MILL.

And now comes said def't, by Campbell & Lawrence & M. W.

Fuller, its att'ys, and moves that the finding of the court be set aside, and a new trial be granted herein, for the following reasons, to wit:

1. The court erred in admitting the evidence for the pl'ffs under the 1st count & also under the 2d count of said declaration, because of variance, and erred in not sustaining def't's motion to exclude the same.

2. The court erred in admitting incompetent evidence on the pl'ffs' behalf, and especially in admitting the evidence of Mr. Bradley as to alleged conversations between him and Chisholm prior to the execution of the contract.

3d. The court erred in finding that the def't took the risk of the capacity of the Leland furnace.

119 4th. The court erred in finding that the iron shipped June 4th, June 8th, June 23d, & July 2d, 1881, and on each of these days, was shipped as near the opening of navigation in 1881 as possible.

5th. The court erred in finding that the def't was bound to take any iron manufactured after the year 1880.

6th. The finding of the court was against the evidence & the weight of evidence.

7th. The court erred in finding the difference between the market price, when the court holds the iron should have been received, and the price agreed to be paid as eighteen dollars per ton.

8th. The court erred in finding that the delivery of the ores in the proportion in which they were delivered was in compliance with the contract.

9th. The court erred in finding that the def't was bound to take the 1,222 tons unmanufactured at the opening of navigation in 1881.

10th. The court erred in holding that the def't was not excused from taking the iron which was delayed in the manufacture by the giving out of the furnace for want of charcoal.

11th. The court erred in holding that the def't took the risks consequent upon the nature of the harbor at Leland, the character of the price, the capacity of the furnace, & the want of charcoal, and each of them.

120 12th. The court erred in finding for the plaintiffs and also in the assessment of damages.

13th. The court erred in the admission of incompetent evidence for the pl'ffs & in overruling def't's objections thereto, & in the rejection of competent evidence offered in def't's behalf & in sustaining pl'ffs' objections thereto.

14th. The court erred in all of its special findings & each of them.

15th. And for other reasons.

CAMPBELL & LAWRENCE,
M. W. FULLER,
For Def't.

Endorsed: Filed Jul. 28, 1883. W. H. Bradley, clerk.

121 Which the court overruled and entered judgment on the findings; to which decision of the court in finding for the plaintiffs and assessing the plaintiffs' damages at the amount stated, and in overruling the defendant's motion for a new trial and in entering judgment on the findings, the defendant, by its counsel, then and there duly and severally excepted.

And for as much as the matters and things hereinbefore set forth do not otherwise appear the defendant prays that this its bill of exceptions may be signed and sealed, which is done accordingly.

H. W. BLODGETT, [SEAL.]
Judge, etc.

(Endorsed:) Filed July 28, 1883. Wm. H. Bradley, clerk.

122 Afterwards, to wit, on the fifth day of September, A. D. 1883, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

In the Circuit Court of the United States for the Northern District of Illinois.

CHARLES D. RHODES and DAVID C. BRADLEY
vs.
THE CLEVELAND ROLLING MILL COMPANY.

Know all men by these presents that we, The Cleveland Rolling Mill Company, a corporation of the State of Ohio, located at the city of Cleveland, as principal, and Edson Keith and Marshall Field, as sureties, are held and firmly bound unto Charles D. Rhodes and David C. Bradley in the sum of one hundred and twenty-five thousand ($125,000.00) dollars, to be paid to said Rhodes and Bradley, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and dated the 29th day of August, in
123 the year of our Lord one thousand eight hundred and eighty-three.

Whereas the above-named The Cleveland Rolling Mill Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of the above obligation is such that if the above-named The Cleveland Rolling Mill Company shall prosecute its said writ of error to effect, and answer all damages and

costs if it shall fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect.

CLEVELAND ROLLING MILL CO., [SEAL.]
WM. CHISHOLM, *Pres't.*
EDSON KEITH. [SEAL.]
MARSHALL FIELD. [SEAL.]

Attest: ED. L. PAGE, *Sec'y.* [SEAL.]

Approved.
H. W. BLODGETT, *Judge.*

Approved Sept. 5, 1883.
THOMAS DRUMMOND.

Endorsed: Filed Sept. 5, 1883. Wm. H. Bradley, clerk.

124 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Charles D. Rhodes and David C. Bradley are the plaintiffs, and The Cleveland Rolling Mill Company is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

In tesiimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this twenty-fifth day of September, 1883.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

125 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court between Charles D. Rhodes and David C. Bradley, plaintiffs, and Cleveland Rolling Mill Company, defendants, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Cleveland Rolling Mill Company, as by their complaint appears, and it *is* being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1883, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected,

the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the 108th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

[Endorsed:] Supreme Court of the United States. Charles D. Rhodes and David C. Bradley *vs.* Cleveland Rolling Mill Company. Writ of error.

126 UNITED STATES OF AMERICA, *ss:*

Charles D. Rhodes and David C. Bradley, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the Cleveland Rolling Mill Company is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Thomas Drummond, judge of the circuit court of the United States for the northern district of Illinois, this 5th day of Sept., in the year of our Lord one thousand eight hundred and eighty-three.

THOMAS DRUMMOND, *Judge.*

Service of a copy of the foregoing citation accepted this 5th day of September, 1883.

E. A. STORRS & J. M. FLOWER,
Attorneys for Defendants in Error.

127 [Endorsed:] United States circuit c't, northern dist. of Illinois. Rhodes & Bradley *vs.* Cleveland Rolling Milling Company. Citation and acceptance of service. Filed Sept. 6, 1883. Wm. H. Bradley, clerk.

128 *Error to the Circuit Court of the United States in and for the Northern District of Illinois.*

UNITED STATES OF AMERICA, *ss:*

In the Supreme Court Thereof.

CLEVELAND ROLLING MILL COMPANY, Plaintiff in Error,
vs.
CHARLES D. RHODES and DAVID C. BRADLEY, Defendants in Error.

And now comes the said plaintiff in error, The Cleveland Rolling

Mill Company, by Beach and Cushing and Campbell and Lawrence, its attorneys, and says that in the foregoing record and proceedings there is manifest error in this, to wit:

1st. The circuit court erred in admitting improper and incompetent evidence on behalf of the plaintiffs against the objection of the defendant.

2d. The circuit court erred in excluding proper and competent evidence offered by the defendant.

3d. The circuit court erred in not excluding the plaintiffs' evidence as varient with the first and second counts, and each of them, of their declaration.

4th. The circuit court erred in not excluding the testimony of plaintiff Bradley as to conversations with Wm. Chisholm relative to the capacity of the Leland furnace.

129 5th. The circuit court erred in not excluding all evidence as to the capacity of the Leland furnace.

6th. The circuit court erred in not finding the issues in favor of defendant.

7th. The circuit court erred in finding the issues in favor of plaintiffs.

8th. The circuit court erred in its assessment of plaintiffs' damages.

9th. The circuit court erred in refusing to make the special findings, and each of them, requested by the defendant.

10th. The circuit court erred in making its special findings, and each of them, contained in said record.

11th. The circuit court erred in overruling the motions, and each of them, of defendant to set aside its findings and to grant a new trial.

12th. The circuit court erred in entering the judgment aforesaid in favor of the plaintiffs in manner and form aforesaid.

Wherefore and for divers other errors manifest upon said record the plaintiff in error respectfully prays that said judgment may be reversed.

CLEVELAND ROLLING MILL COMPANY,
By BEACH AND CUSHING AND
CAMPBELL & LAWRENCE, *Its Att'ys.*

Endorsed on cover: N. Illinois C. C. U. S. No. 427. The Cleveland Rolling Mill Company, plaintiff in error, *vs.* Charles D. Rhodes and David C. Bradley. Filed 13th October, 1883.

121-255

MAR 1 1887
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

THE CLEVELAND ROLLING MILL COMPANY,
Plaintiff in Error,

vs.

CHARLES D. RHODES and DAVID C. BRADLEY,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

GEO F. EDMUNDS,
OF COUNSEL.

WM. E. CUSHING,
ATTORNEY FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

THE CLEVELAND ROLLING MILL COMPANY,
Plaintiff in Error.

vs.

CHARLES D. RHODES and DAVID C. BRADLEY,
Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action in the Circuit Court was brought by Charles D. Rhodes and David C. Bradley, of Chicago, Illinois, (defendants in error), partners under the firm name of Rhodes & Bradley, against the Cleveland Rolling Mill Company, of Cleveland, Ohio, (plaintiff in error), and was founded on the following contract:

Contract Between Rhodes & Bradley and the Cleveland Rolling Mill Company, Sued upon.

"This agreement, made this sixteenth day of February, A. D. 1880, by and between Rhodes & Bradley of Chicago, Ills., and the Cleveland Rolling Mill Co., of Cleveland, Ohio, witnesseth: That said Rhodes & Bradley have sold to the said Cleveland Rolling Mill Co., the entire product of fourteen thousand (14,000)

tons iron ore, to be manufactured into pig-iron with charcoal by the Leland Furnace Co., of Leland, Mich., said furnace to make as nearly all numbers one and two iron as possible, and to be shipped in vessel cargoes as rapidly as possible to the Cleveland Rolling Mill Co., at Cleveland, Ohio, during the season of navigation of 1880. Such portion of the product of said ores as is made after the close of navigation of 1880 is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible, said Cleveland Rolling Mill Co., to have the privilege of ordering the iron which may be made too late for shipment by lake during the season of 1880 through by rail to Cleveland during the winter of 1880 & 1881, they to pay the additional expense of hauling to railroad and freighting through to Cleveland by rail over and above what it would cost Rhodes & Bradley to ship by lake on the opening of navigation 1881.

"Said Cleveland Rolling Mill Co., agree to receive said iron as rapidly as shipped and to pay forty-five dollars ($45) per ton (2,240 lbs.) cash for same delivered on rail or vessel at Cleveland, Ohio. The Cleveland Rolling Mill Co. are to have the option of taking a portion of the iron delivered at Chicago, Ills., at the same price and on the same terms and conditions as stated above for delivery in Cleveland, said Cleveland Rolling Mill Co. to furnish a good and suitable dock at which to unload vessels, either at Cleveland or Chicago, and to pay vessels any demurrage which they may be justly entitled to by reason of delay in furnishing a dock at which they can be discharged.

"The iron ore to be furnished at the Leland Iron

Co., out of which said iron is to be manufactured, is as follows:

"6,000 tons Cleveland mine.
" 5,000 " Norway "
" 1,500 " Rolling Mill mine.
" 1,500 " Stephenson "

"And whereas Rhodes & Bradley's contracts with said mining companies are to the effect that in case of accidents or strikes at said mines, resulting in reduced output of ore, said companies are to have the privilege of reducing the amounts due Rhodes & Bradley, as above stated, in same proportion as other sales, the said Cleveland Rolling Mill Co. agree not to hold Rhodes & Bradley responsible for delivery of pig-iron beyond the product of such ores as the mining companies deliver them; also in case accidents or strikes at said Leland furnace, resulting in the stoppage of said furnace, then Rhodes & Bradley are not to be held responsible for delivery of pig-iron under the contract beyond the responsibility of the Leland Iron Co. to them, under contract between said Leland Iron Co. and Rhodes & Bradley, dated Jan. 14th, 1880, which contract, as well as Rhodes & Bradley's contracts with the mining companies, is hereby made a part of this agreement.

"RHODES & BRADLEY,
"CLEVELAND ROLLING MILL CO.,
"WM. CHISHOLM, *V. Pres't.*"

(Rec. pp. 12, 13.)

The contracts of Rhodes & Bradley with the ore companies, and with the Leland Iron Co., referred to

in this agreement and expressly "made part of" it, are found on pages 10, 11 and 12, (top paging) of the printed record.

THE PLEADINGS.

Rhodes & Bradley's declaration was in *assumpsit*, and, as finally amended, consisted of two counts.

The first count set out the contracts aforesaid; alleged full performance generally on plaintiffs' part; further alleged that the ore was duly delivered, and all made into iron, and the iron shipped with due speed to defendant during the lake season of 1880, and that defendant received and paid for all the iron shipped that season, amounting to 3,422 tons; that 4,653 tons of iron were made after navigation closed in 1880, and were shipped in vessel cargoes to Cleveland in 1881 as soon as possible after the opening of navigation, and tendered to defendant on arrival;

Breach, that defendant refused to accept and pay for the 4,653 tons. (Rec. pp. 6, 18.)

The second count set out the contracts; alleged generally that plaintiffs had fully performed all agreements and conditions on their part, and had been always ready to keep and perform the same;

Breach, that defendant in or about December, 1880, notified plaintiffs that it would not receive any iron made or tendered after December 31, 1880, and repudiated the contract and had then and ever since wholly refused to carry it out. (Rec. p. 15.)

To this declaration defendant pleaded *non assumpsit* and also certain special pleas (Rec. pp. 19, 20), but before trial it was ordered by agreement (Rec. p. 23) that all the special pleas be withdrawn, and that defendant have leave to make all special defenses under its plea of the general issue.

TRIAL.

A jury was waived by written stipulation duly filed (Rec. p. 23) and the cause tried to the court, in accordance with Section 649 of the Revised Statutes.

At the close of the evidence, defendant asked the court to hold—

"That upon the evidence under the contract sued on, the defendant was not bound to take any of the iron after the shipment of November 8th, 1880, and the plaintiffs cannot therefore recover." (Rec. p. 53.)

The court refused and defendant excepted. (Rec. p. 53.)

Defendant also moved the court to exclude plaintiffs' evidence on the ground of variance, in that it tended to establish excuses for non-performance instead of tending to show performance. This motion also was overruled and defendant excepted. (Rec. p. 52.)

The court then made certain special findings which are set forth on pages 23-5 of the Record: and on its findings rendered judgment for plaintiffs below in the sum of $82,422. (Rec. pp. 33, 34, 53, 55).

in this agreement and expressly "made part of" it, are found on pages 10, 11 and 12, (top paging) of the printed record.

THE PLEADINGS.

Rhodes & Bradley's declaration was in *assumpsit*, and, as finally amended, consisted of two counts.

The first count set out the contracts aforesaid; alleged full performance generally on plaintiffs' part; further alleged that the ore was duly delivered, and all made into iron, and the iron shipped with due speed to defendant during the lake season of 1880, and that defendant received and paid for all the iron shipped that season, amounting to 3,422 tons; that 4,653 tons of iron were made after navigation closed in 1880, and were shipped in vessel cargoes to Cleveland in 1881 as soon as possible after the opening of navigation, and tendered to defendant on arrival;

Breach, that defendant refused to accept and pay for the 4,653 tons. (Rec. pp. 6, 18.)

The second count set out the contracts; alleged generally that plaintiffs had fully performed all agreements and conditions on their part, and had been always ready to keep and perform the same;

Breach, that defendant in or about December, 1880, notified plaintiffs that it would not receive any iron made or tendered after December 31, 1880, and repudiated the contract and had then and ever since wholly refused to carry it out. (Rec. p. 15.)

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Defendant excepted to each of the special findings, to the overruling of its motion for a new trial and to the judgment as entered (Rec. pp. 34, 53, 55); and took a bill of exceptions, bringing all the evidence upon the Record. (Rec. pp. 34, 52).

SPECIFICATION OF ERRORS.

The Circuit Court erred:

1. In overruling defendant's motion to exclude plaintiffs' evidence on the ground of variance.

2. In refusing to find, as matter of law, that the evidence was insufficient to authorize a judgment in plaintiffs' favor.

3. In finding, as matter of law, (special finding No. 6), that after close of navigation in 1880, the manufacture of ore into iron was continued without unreasonable delay.

4. In finding that plaintiffs were entitled to judgment.

5. In not finding that defendant was entitled to judgment.

6. In rendering judgment for plaintiffs upon the findings of fact.

7. In holding that the contract bound defendant to accept iron manufactured after the opening of navigation in 1881.

Stated more in detail, our claims are:

1. That the evidence did not warrant a judgment in favor of plaintiffs, because it failed to show the performance on plaintiffs' part of certain conditions precedent to any liability of defendant; and did show affirmatively the non-performance of other such conditions.

2. That the special findings are insufficient to support the judgment in plaintiffs' favor, in that they fail to show that the ore was made into No. 1 and No. 2 iron as nearly as possible: and

3. In that they fail to show that the iron made too late to ship in 1880 was shipped in 1881 as soon as possible after navigation opened: and

4. In that they show affirmatively that Rhodes & Bradley did not fulfill the condition, that the iron made and tendered should be the product of the agreed quantities of the agreed kinds of ore:

5. Nor the condition, that the iron should be the product of 14,000 tons of ore and no more:

6. Nor the condition, that the manufacture of iron should be completed during the winter of 1880–81:

7. Nor the condition, that the manufacture should be carried on as rapidly as possible.

8. That it was error to hold that defendant was bound to accept any iron on the opening of navigation in 1881 when the whole could not be, and was not, delivered within the time limited by the contract.

9. It was error to hold that the contract bound defendant to accept iron that was not ready for shipment on the opening of navigation in 1881.

10. It was error to refuse to exclude plaintiffs' evidence on the ground of variance.

THE LAW OF THE CASE.

We claim that the special findings of fact do not support the judgment; and further, that they affirmatively show it to be wrong. As the judgment cannot stand if they do not support it (Rev. Stat., Sec. 700); and as it ought to be rendered in favor of plaintiff in error if they show it to be entitled to judgment (*Fort Scott v. Hickman*, 112 U. S. 150); we will first discuss the sufficiency of these findings, before proceeding to a consideration of the evidence.

WHAT THE SPECIAL FINDINGS SHOW.

The contract in suit, as we construe it, was in substance this:

Rhodes & Bradley were to deliver at Leland, Michigan, before Nov. 1, 1880, *6,000 tons of Cleveland Mine ore, 5,000 tons Norway Mine ore, 1,500 tons Rolling Mill Mine ore, and 1,500 tons Stephenson Mine ore; in all 14,000 tons.* This ore, in the desired mixtures, was to be made into pig iron (Nos. 1 and 2, so far as might be) *as rapidly as possible*, and the product shipped by lake as fast as possible to defendant during the season

of navigation in 1880; any made after that season closed, to be shipped by lake *on the opening of navigation in 1881*, or as near the opening as possible; *or*, defendant might at its option have this portion sent by rail *during the winter*, itself paying the extra cost of carriage over what it would cost to ship by lake on the opening of navigation in 1881.

Defendant was to take and pay for the iron as fast as delivered to it at Cleveland.

By way of performance, this (as the findings show) was what was done:

Ore was delivered at Leland, *not in the quantities agreed on, but in others widely varying from those named in the contract*, and *in total amount 168 tons in excess of what the Rolling Mill Company was bound to take the product of*; 3,421 tons of iron were made and shipped, and were received and paid for by defendant before navigation closed in 1880; from the ore remaining, iron amounting to some 4,600 tons was made, *but not made as rapidly as possible, nor in such time that defendant could receive it during the winter*, but on the contrary, *1,100 tons*, or about one-fourth of the whole of this residue, *remained still to be made when*—on May 7th, 1881—navigation having re-opened, *shipments by lake were resumed;* and *the manufacture and shipment did not close until July 2d, 1881;* and this delay was owing to the failure of the managers of the furnace to provide themseves with a sufficient supply of fuel; and further,

the *product of the surplus 168 tons of ore was shipped and tendered along with the rest;* and it is not shown that it was in any way separated or distinguished from the rest. The rolling mill company, late in February, 1881, (when it was evident past a doubt that the iron would not and could not be ready for delivery before or at the opening of navigation), notified plaintiffs that it would receive no iron made after December 31, 1880, and in May it further notified them that it would receive none at all; but Rhodes & Bradley, wholly disregarding these notices, continued to manufacture and, after navigation opened, to ship, until the entire product was tendered in Cleveland to defendant, which refused each cargo as tendered.

Such is the affirmative showing of the findings. They fail, too, to show that the iron refused by defendant was as nearly as possible of the grades known as Nos. 1 and 2; and fail to show that it, or any of it, was shipped on the opening of navigation in 1881, or as near the opening as possible.

It thus appears that Rhodes & Bradley failed to perform their contract in relation to the nature of the thing to be furnished; to the quantity; and to the time of performance.

In each of these respects, it is submitted, there was on their part a breach of condition precedent.

The subject of implied conditions in executory contracts of sale has been so recently before this Court, and

so exhaustively reviewed, that we shall merely refer the cases—

Norrington v. Wright, 115 U. S. 188, and

Filley v. Pope, 115 U. S. 213—

and to the opinions delivered therein.

In the first named case Norrington agreed to ship from European ports to Wright at Philadelphia, 5,000 tons of rails at the rate of about 1,000 tons a month, beginning in February and ending before August 1st. He did ship the 5,000 tons within the specified limits, but of this he shipped only 400 tons in February and but 885 in March. Wright accepted and paid for the February shipment on its arrival in March; but in May, about the time of the arrival of the March shipments, he first learned what the amounts of the February and March shipments were, and thereupon refused to be bound any further by the contract. Held, in Norrington's suit for damages from non-acceptance, that this refusal was justified.

In the second case, Pope had agreed to deliver to Filley at New Orleans 500 tons of Schott's pig iron, the iron to be shipped from Glasgow as soon as possible. Schott's furnace, where Pope procured the iron, is about midway between Glasgow, on the west coast of Scotland, and Leith, on the east coast. Vessels proving so scarce that none could be had at Glasgow then or for weeks later, and the only available one, the Alpha, being at Leith, she was chartered and the iron was

shipped on her from Leith as soon as possible, and reached New Orleans sooner than if it had been sent from Glasgow. Filley refused to accept it—why, the report does not show. Held that this refusal was justified.

The principle of these decisions is stated in the opening sentence of the opinion in the *Norrington* case:

"A statement descriptive of the subject matter, or "of some material incident, such as the time and place "of shipment, is ordinarily to be regarded as a war- "ranty, in the sense in which that term is used in "insurance and maritime law, that is to say, a condition "precedent, upon the failure or non-performance of "which the party aggrieved may repudiate the whole "contract. *Behn v. Burness*, 3 B. & S. 751: *Bowes v. "Shand*, 2 App. Cas. 455: *Lowber v. Bangs*, 2 Wall. 728: "*Davison v. Von Lingen*, 113 U. S. 40."

We proceed to consider by that rule the case at bar.

I.

THE SPECIAL FINDINGS AFFIRMATIVELY SHOW A BREACH OF THE CONDITION, THAT THERE SHOULD BE DELIVERED AT THE FURNACE, AND MADE INTO IRON, 6,000 TONS CLEVELAND MINE ORE, 5,000 TONS NORWAY MINE ORE, 1,500 TONS ROLLING MILL MINE ORE, AND 1,500 TONS STEPHENSON MINE ORE.

Instead, the quantities of ore delivered, and the ingredients of the iron manufactured, were as follows:

5,980 tons Cleveland Mine ore, a shortage of 20 tons; 4,405 tons Norway Mine ore, a shortage of 595 tons; 1,478 tons Rolling Mill Mine ore, a shortage of 22 tons; 2,305 tons Stephenson Mine ore, an overplus of 805 tons. (Special finding No. 3.)

It is true that the agreement exempted Rhodes & Bradley from liability for shortages resulting from such accidents or strikes at the mines, as would exempt the mining companies, under their contracts with Rhodes & Bradley, from full deliveries to the latter. Reference to these contracts however, shows that in the one for the purchase of Norway ore (Rec. p. 10), no such exemption was reserved to the mining company (the Menominee). No strikes or accidents, therefore, would relieve that company from the obligation to deliver the full amount of Norway Mine ore. Suffice it to say, however, that no such excuse—no excuse at all, in fact, is offered for the shortages of ore, or for either of them. The declaration alleges "delivery of the 14,000 tons of ore *mentioned in said contract*." (Rec. p. 8), and says nothing of any deficiencies, strikes, accidents or excuses. The special findings are equally silent.

It is submitted that under a contract for the product of 5,000 tons of Norway Mine ore, a tender of the product of 4,405 tons is bad, and imposes on the vendee no obligation to accept.

That under a contract for the product of 1,500 tons Stephenson Mine ore, a tender of the product of 2,305

tons is bad, and imposes on the vendee no obligation to accept.

And similarly as to the other ores mentioned.

A *fortiori*, under a contract for the product of a mixture of ores, including 5,000 tons of Norway Mine ore, and 1,500 tons of Stephenson, a tender of the product of a mixture including 2,305 tons of Stephenson and but 4,405 tons of Norway, is bad, and imposes on the vendee no obligation to accept.

The Circuit Court found that Norway Mine ore and Stephenson Mine ore were identical in quality and value (Sp. Finding No. 4), and held that notwithstanding the discrepancies in the quantities of these ingredients, the defendant below had no right to reject the product.

The judgment below was rendered before the decision of *Norrington v. Wright* and *Filley v. Pope, supra*, by this Court, and reference to the opinion of his Honor Judge Blodgett, in our case, shows his reasoning is inconsistent with the rule adopted in those cases. The portion of his opinion which deals with this subject is as follows (Rec. p. 32):—the italics are ours:

"By the contract with the Leland Company these "ores were to be mixed as directed by plaintiffs. No "evidence of any direction by plaintiffs or defendant "as to the mixing of the ores is put into the case. "The defendant accepted the entire quantity of *ore*,"

(*iron* is meant, as the remainder of the sentence clearly shows) "shipped during the season of 1880 "without any complaint as to the quality of the iron, "and even offered to take all that had been made up "to the 1st of January, 1881, and no objection was "raised as to the quality of their iron. I *therefore* con- "clude—that the excess of Stephenson ore over the "Norway *has in no perceptible way affected the character* "*of the product of these masses of ores*, and that these "facts furnish no excuse for the breach of the contract "by defendant."

To the Circuit Court's proposition that because ore taken from the Stephenson Mine is just as good as ore taken from the Norway Mine, and the same in quality and value, therefore he who has bought one must receive the other, as the character of what he is getting is not in any "perceptible way affected," a complete answer is given in the opinion in *Filley v. Pope*, cited above—

"The Court has neither the means, nor the right, to "determine why the parties in their contract specified "shipment from Glasgow, instead of using the more "general phrase, 'shipment from Scotland,' or merely "'shipment,' without naming any place; *but is* "*bound to give effect to the terms which the parties have* "*chosen for themselves.*" (*115 U. S., p. 220.*)

And by Lord Cairns' language in *Bowes v. Shand*, L. R. 2 App. Cas., 455, cited in *Norrington v. Wright*, *supra*—

"It does not appear to me to be a question for your "Lordships, or for any court to consider—*why* the stipu- "lation is made that the shipment should be during "those particular months."

The fact, in *Bowes v. Shand*, that rice put on board in February was just like rice put on board in March; and the fact, in *Filley v. Pope*, that the vendee got his iron sooner by shipment from Leith than if it had been sent from Glasgow, were held immaterial.

In our case the buyer took the risk of the quality of the product of a certain quantity of ore from the Stephenson Mine and of a certain quantity from the Norway Mine; but not the risk of the quality of any other quantities. Under the rule adopted in *Filley v. Pope*, it is unnecessary to inquire why defendant below stipulated for those particular quantities and no others. It may, however, be noted in passing, that these mines, Norway and Stephenson, were under different managements (see the ore contracts, Rec. pp. 10, 11); and it may well be that ores which *in situ* are alike may be of very different value when mined owing to differences in the methods and care employed in mining; and further, that the price at which Rhodes & Bradley sold

this very Stephenson ore to the Leland Iron Co. was 25 cents per ton in excess of the price they put upon the Norway ore. (See the contract, attached to and made part of the contract in suit—Rec. p. 11.)

DEFENDANT BELOW DID NOT WAIVE THIS CONDITION.

Should it be claimed that defendant below, by accepting the iron shipped in 1880, waived objections to the discrepancy in ores, the answer is:

1. Under the pleadings, no question of waiver can arise. The declaration does not state that Rhodes & Bradley delivered the wrong ores, and that their vendee waived all objections; it alleges that the ores were those "mentioned in the contract," and that plaintiffs had on their part fully performed all conditions and agreements.

It is familiar law that under allegations of full performance, part performance and waiver cannot be proved:

Langdell's Summary of the Law of Contracts, sec. 175 and notes. *2 Smith's Leading Cases, pt. 1 (8th Am. Ed.) 37. 1 Chitty on Pleading, 327;* approved in opinion in *Insurance Co. v. Tolman*, 80 Ills. 108. *Taylor v. Beck*, 13 Illinois 377.

And though the variance might be cured by verdict if not seasonably objected to, yet under Illinois practice the proper mode of objection is to move the

trial court to exclude plaintiffs' evidence on the ground of variance—

Wabash Railway Co. v. Coble, 113 Ills., 115.

—and this was done in our case and exception taken to the refusal of the Circuit Court to exclude the evidence (Rec. p. 52.)

2. But, pleadings aside, neither waiver, nor any fact amounting to waiver, was found by the Court.

The findings show that the deliveries of ore were not completed till Oct. 18, 1880 (Finding No. 3.) Not till then could even the Leland Iron Co. know of the shortages. Not till navigation closed, on Nov. 15th, (Finding No. 6) could any one know that Rhodes & Bradley would not supply the deficiencies. Not even then—not even up to the time of the tenders of iron in 1881, so far as appears from the findings, had the Rolling Mill Company any knowledge or any means of knowledge that the deliveries of ore were not in conformity with the contract. But the manufacture of iron began soon after the ore commenced to arrive at Leland in May, 1880, (Findings Nos. 3, 5, 6.) and the shipments of iron to Cleveland were made as fast as possible during the whole season of 1880 and while the delivery of ore at Leland was still proceeding. The iron received by defendant in 1880 was less than half the product of the whole mass of ore. It does not appear, therefore, that the portion of the product affected by the discrepancies in the ores was the part

shipped and received in 1880; but rather that it was the part tendered and refused in 1881. Hence the receipt of the cargoes of iron shipped in 1880 was no waiver. The case as to them is like that of the February cargo accepted and paid for without knowledge of the breach of condition, in *Norrington v. Wright*, supra.

In addition to the cases cited in *Norrington v. Wright* the following are referred to as re-statements and applications of the rule of that case, that "statements descriptive of the subject matter are conditions precedent."

Brawley v. United States, 96 U. S. 168. "Where no "such independent circumstances" (as show the subject matter of the sale to be an existing and specific *lot* of goods) "are referred to, and the engagement is "to furnish goods of a certain quality or character to "a certain amount, *the quantity specified is material, and* "*governs the contract.*"

Tamvaco v. Lucas, 1 El. & El., 581. Action by the vendor of "about 2,000 quarters, say from 1,800 to 2,200 quarters of wheat," against vendee, for non-acceptance. Plea, tender was of 2,215 quarters. On demurrer the plea was held good.

Tamvaco v. Lucas, 1 El. & El., 591. Action between the same parties, on a second contract for a like quan-

tity of wheat. Plea, tender was of less than 1,800 quarters. On demurrer this plea also was held good.

Rommel v. Wingate, 103 Mass., 327. Tender of 392 tons, under a contract for 375, held to justify a refusal to accept any.

Stephenson v. Burgin, 49 Pa. St., 36. Tender of 107 tons of oil cake, under a contract for 100, held to justify a refusal to accept any.

Johnson v. Raylton, 7 Q. B. D., 438. Contract by plaintiff, a manufacturer, to furnish 2,000 tons iron ship plates, "quality known as Crown," at defendant's ship yard. After furnishing part, plaintiff closed his works, and proposed to fill the rest of the order by delivering plates of the same quality as his, and substantially as good, but made by another maker. Defendant refused to accept. It was held that in the absence of special usage, a manufacturer in selling goods impliedly agrees that they are of his own make; that this implied agreement, being descriptive of the subject matter of the contract, is a condition precedent; hence plaintiff could not recover. Whether the Court was right in its construction of the agreement, need not be discussed here; we cite the case as holding that, given a contract to furnish goods of A's make, a tender of precisely similar goods of B's make is not good

II

THE SPECIAL FINDINGS AFFIRMATIVELY SHOW A BREACH OF THE CONDITION, THAT 14,000 TONS OF ORE SHOULD BE DELIVERED AT THE FURNACE AND THE PRODUCT OF 14,000 TONS OF ORE TENDERED TO THE ROLLING MILL COMPANY.

Instead, 14,168 tons of ore were delivered (Finding No. 3) and the whole quantity was made into iron and all this iron was tendered to defendant (Finding No. 6).

This surplus of course, did not affect the quantity of iron received and paid for in 1880, but it made the quantity tendered in 1881 too great.

That a tender of too much is as fatal as a tender of too little, see *Benjamin on Sales*, Sec. 689 (3d (Bennett's) —American Edition).

Rommel v. Wingate, supra.

Stephenson v. Burgin, supra.

Tamvaco v. Lucas, supra (1 El. and El. 591.)

Norrington v. Wright, 115 U. S., see page 205.

III.

THE FINDINGS FAIL TO SHOW FULFILLMENT OF THE CONDITION, THAT THE ORE SHOULD BE MADE INTO AS NEARLY ALL NUMBERS ONE AND TWO IRON AS POSSIBLE. THEY ALSO FAIL TO SHOW FULFILLMENT OF THE CONDITION, THAT THE IRON MADE AFTER THE CLOSE OF NAVIGATION IN 1880, SHOULD BE SHIPPED AS SOON AS POSSIBLE AFTER THE OPENING OF NAVIGATION IN THE SPRING OF 1881.

Hence in these respects also they fail to support the judgment.

IV.

THE SPECIAL FINDINGS AFFIRMATIVELY SHOW A BREACH OF THE CONDITION, THAT THE MANUFACTURE OF IRON SHOULD BE COMPLETED BY OR BEFORE THE OPENING OF NAVIGATION IN THE SPRING OF 1881.

For ease of reference, we repeat here the portion of the contract relating to the time allowed for manufacture:

"The entire product of 14,000 tons iron ore, to be "manufactured into pig iron with charcoal by the "Leland Furnace Company, said furnace to make as "nearly all numbers one and two iron as possible, and "to be shipped in vessel cargoes as rapidly as possible "to the Cleveland Rolling Mill Co., at Cleveland, Ohio,

"during the season of navigation of 1880. Such por-
"tion of the product of such ores as is made after the
"close of navigation of 1880 is to be shipped by vessel
"to Cleveland on the opening of navigation of 1881,
"or as near the opening as possible, said Cleveland
"Rolling Mill Co. to have the privilege of ordering
"the iron which may be made too late for shipment
"by lake during the season of 1880 through by rail to
"Cleveland during the winter of 1880 and 1881, they
"to pay the additional expense of hauling to railroad
"and freighting through to Cleveland by rail over and
"above what it would cost Rhodes & Bradley to ship
"by lake on the opening of navigation 1881."

This, we submit, is an agreement by Rhodes & Bradley that the manufacture shall be completed not later than the end of the "winter of 1880–81." We may concede for the purposes of this argument that the term "winter" is used, not with its ordinary and limited meaning, but in the broader sense of "the season when navigation is suspended." Whatever season is meant, the remaining iron is to be made in such time that it (not part of it merely, but all of it,) may be taken away by rail, if the Rolling Mill Company so wishes, during that season. If not so taken away, then Rhodes & Bradley are to send it by lake *on* the opening of navigation, *or as near the opening as possible.*

This last alternative provision is added, evidently, to save Rhodes & Bradley from liability for unfore-

seen delays incident to *shipment*—shipment of things ready for shipment—arising from bad weather, accidents to vessels, and like causes: but clearly it does not refer to delays in manufacture. Otherwise Rhodes & Bradley would have used the same language which they employed in the earlier part of the contract with reference to the prior season; and after the clause

> "to be shipped in vessel cargoes as rapidly as possible to Cleveland during the season of navigation of 1880"

they would have added simply—

> "such part of the iron as is made after the close of navigation of 1880, to be shipped by vessel to Cleveland as rapidly as possible during the season of navigation of 1881."

On any other construction the words we italicise in the phrase "to be shipped by vessel to Cleveland *on the opening of navigation* in 1881" would be pure surplusage. To give them any force or value they must be construed as limiting the time of manufacture.

The special findings do not show when navigation opened in 1881, but they do show that it was open as early as May 7th, because shipment in cargo lots was resumed on that day (Finding No. 6.)

The case, then, stands thus upon the findings: Rhodes & Bradley agreed to make for defendant, in

round numbers, 8,000 tons of pig iron by or before May 7th, 1881, and to deliver it by lake as fast as possible after manufacture. Some 3,400 tons were delivered and paid for, in 1880, before the rest was made. Winter then suspended deliveries. The contract also provided that the manufacture should be completed in such time that defendant might at its option have the iron sent it by rail by or before May 7th.

When May 7th arrived, 3,500 tons (of the remaining 4,600) had been made, and 1,100 tons were still to be made. The vendee refused to accept any of it. (Findings Nos. 6, 8.)

We submit that the case is covered by *Norrington v. Wright*, supra; and that the vendee, under a contract to buy 4,600 tons of iron made before May 7th, was under no obligation to accept 3,500 tons made before that date, or 1,100 tons made after it, or 4,600 tons made partly before and partly after it; not to speak of the fact that it was tendered, in part, long after the time when, evidently, the deliveries should according to the contract have been completed.

V.

THE FINDINGS SHOW A BREACH OF THE CONDITION, THAT THE ORE SHOULD BE MADE INTO IRON AS RAPIDLY AS POSSIBLE.

It would be highly improbable that a mercantile contract, dealing with a commodity as changeable in

value as iron, and extending necessarily over so long a time, should be made without some provision either as to the time within which the work must be completed, or as to the rate of its prosecution or as to both. In the contract in suit we find provisions of each kind. The limitation (the work must be finished during the winter) has been already pointed out. In addition to this, failing any express stipulation as to the rate of progress, the condition would be implied, that the manufacture should be carried on with due diligence. But there does appear an express stipulation: the iron is to be made "as rapidly as possible."

The contract reads "Rhodes & Bradley have sold to "the said Cleveland Rolling Mill Co. the entire pro- "duct of *14,000 tons iron ore, to be manufactured into* "*pig iron*, with charcoal, by the Leland Furnace Co. "of Leland, Mich., said furnace to make as nearly all "numbers one and two iron as possible, *and to be shipped* "*in vessel cargoes as rapidly as possible*, etc." Omitting the parenthetical and explanatory clauses, the passage reads "iron ore, to be manufactured into pig iron—and to be shipped—as rapidly as possible." The phrase "as rapidly as possible" applies, it is submitted, as well to the manufacture as to the shipment. The vendee could have had no reason for requiring greater diligence in the latter process than in the former.

Clearly under the rule in *Norrington v. Wright* and *Filley v. Pope*, vendors' agreement to manufacture as

rapidly as possible constitutes a condition by them to be fulfilled, precedent to vendee's obligation to accept.

Was the iron made "as rapidly as possible?"

The Circuit Court found specially, that the Leland Company proceeded during the lake season of 1880 to manufacture with "proper diligence" (Finding No. 5); that after the close of that season it continued the manufacture "without unreasonable delay"; that on and after May 7, 1881, (navigation having opened), it "continued such manufacture and shipment as rapidly as possible." (Finding No. 6).

But Finding No. 6 continues, "If the average daily product of said furnace from the 8th of November, 1880, to the 8th of May, 1881, had been the same as the average daily product from the 18th of May, 1880, to the 8th of November, 1880, all of said 14,000 tons of ore would have been made into pig iron by about the 10th of May, 1881; but, in fact, the furnace was shut down for a time and part of the time the blast was checked for want of a sufficient supply of charcoal, so THAT about 1,100 tons of said pig iron was made after the 8th of May, 1881."

That is to say, the furnace had ready at the close of the winter but 3,500 tons of iron instead of 4,600; its winter product was but three-fourths as large as it would have been had the furnace been properly sup-

plied with fuel; and the completion of the work of manufacture was thus postponed nearly two months. (Finding No. 6.)

On this state of facts, the Court's finding that the work of manufacture was prosecuted during the winter "without unreasonable delay," (even supposing that to be the equivalent of "as rapidly as possible") is a finding, not of fact, but of law; and we submit that it is wrong, and is shown to be so by the special findings themselves.

The question is, what does "as rapidly as possible" mean?

It means, in this case, that the furnace must be devoted to this work to the exclusion of any other: and must be run, in the manner such furnaces are ordinarily run, up to its reasonably full capacity day after day until the work is done. Rhodes & Bradley, out of abundant caution, stipulated in their contract with the Rolling Mill Company, that they should not be held responsible, in case of accidents or strikes at the furnace, for delivery of iron beyond the responsibility of the Leland Iron Company to themselves under their contract with the Leland Company. But failure to provide more than three fourths enough fuel to supply the furnace during the winter is neither an "accident" nor a "strike." And the responsibility of the Leland Company, under its contract with

Rhodes & Bradley, was not qualified by any exemption for delays resulting from accidents, or from strikes, or from any cause whatever. (See the contract. Rec. p. 11.)

As to the meaning of "as rapidly as possible," see *Hydraulic Engineering Co., v. McHaffie*, L. R. 4 Q. B. D. 670.

McHaffie in July agreed to make a machine for plaintiff "as soon as possible." The machine was tendered late in September, as soon as finished. Plaintiff refused to accept, and sued for damages for not delivering according to contract. At the time the contract was made, defendant had no foreman who could make the necessary patterns, but plaintiff did not know this. This caused the delay.

Field J. before whom the case was tried, found for plaintiff, holding that from the use of the words, 'as soon as possible," plaintiff might assume that defendant had at the time all reasonable appliances to enable him to proceed without delay.

This was affirmed by the Court of Appeal (Bramwell, Brett and Cotton, L. J. J.)

Bramwell, L. J. "To do a thing as soon as possible "means, to do it within a reasonable time, with "an undertaking to do it in the shortest practicable "time. It must be taken against the defendants that "they entered on a contract to do the work with such "appliances as they might reasonably be expected to

"have (though I confess that even this limitation "seems to me doubtful.")

So in the case at bar, it is submitted, the Rolling Mill Company did not take the risk of the Leland Company's miscalculation, or improvidence, or negligence, in failing to provide sufficient charcoal to keep its furnace at work, and at work to its full capacity. That the iron tendered in 1881 did not answer the description of "iron made as rapidly as possible," and the Rolling Mill Company had a right to reject it.

Thus far this question has been treated with sole reference to the affirmative showing of the special findings. It was also raised by our request, at the trial, for a holding that the evidence was insufficient to support a judgment for plaintiff.

The only testimony on the subject was that of V. K. Moore, plaintiffs' witness, who testified that he was the manager of the furnace; that the furnace company made its own charcoal, (Rec. p. 47:) that during the winter the supply was short, necessitating the checking of the furnace (p. 45:) showed by his record (pp. 45, 46) the weekly production, and its diminution throughout the winter, and that the furnace was shut down from April 1st to 19th, 1881; and stated further that "the winter was very severe, the snow was deep and it was with the utmost difficulty that the company was able to haul its coal" (p. 47.)

But this, under the rule in *Engineering Co. v. McHaffie*, supra, was no excuse.

VI.

THE CIRCUIT COURT ERRED IN REFUSING TO FIND, AS MATTER OF LAW, THAT THE EVIDENCE WAS INSUFFICIENT TO AUTHORIZE A JUDGMENT IN PLAINTIFFS' FAVOR.

At the close of the evidence the defendant below asked the Court to hold—

"That upon the evidence under the contract sued on, "the defendant was not bound to take any of the iron "after the shipment of November 8th, 1880, and the "plaintiffs cannot therefore recover."

(There was no dispute about the fact, testified to in chief by plaintiff, Mr. Rhodes, and by his witness, V. K. Moore, that November 8th was the date of the last shipment made in 1880.) (Rec. pp. 39, 43.)

The Court refused so to hold, and defendant excepted. (Rec. p. 53.)

This, it is submitted, was "a ruling in the progress of the trial," (Rev. Stat. sec. 700), and as such may be reviewed here. The Court below was asked to hold, in effect, that the evidence was legally insufficient to support a verdict or judgment for plaintiffs; insufficient, that is, to show that defendant was bound to take any of the iron tendered it in 1881. The Court's refusal was a ruling upon the legal effect of the evidence. A

refusal to grant a like request at the close of plaintiff's evidence, in *Insurance Co. v. Folsom*, 18 Wallace, 237, where, as here, a jury had been waived, was held to be a "ruling in the progress of the trial" and as such reviewable by this Court under section 700. That in the case at bar the request was delayed until all the evidence for both sides was in, is immaterial.

Richardson v. Boston, 19 How. 263, 268.

Schuchardt v. Allen, 1 Wall. 359.

It called on the Court, not to weigh conflicting evidence, but to say, as on a demurrer to the evidence, whether a case for plaintiffs had been made out.

The whole of the evidence is in the Record (see p. 52). It shows without contradiction that too much Stephenson Mine ore was sent to Leland and made into iron, and too little of each of the three other kinds of ore. That altogether 168 tons in excess of the stipulated 14,000 tons of ore was sent and made into iron. That the manufacture was not completed until fifty-three days after the opening of navigation in 1881. (Rec. p. 44). That during the winter the manufacture was not carried on as rapidly as possible, but on the contrary was continually delayed, and for nineteen days suspended altogether, for lack of fuel (charcoal), which the furnace company made for itself. (Rec. pp. 45, 46, 47). That the iron tendered in the spring of 1881 included the product of 168 tons of ore in excess of the 14,000 tons contracted for, and that this was ten-

dered as an indistinguishable part of the spring shipments, as no cargo contained less than 400 tons of iron, and the last cargo—which determined the fact, though without the Rolling Mill Company's knowledge, that the product of this surplus was to be tendered—contained 484 tons of iron (Rec. pp. 39, 42). There is no pretence nor suggestion that defendant had any knowledge or means of knowledge of these irregularities, or of any of them, when it accepted the shipments of iron in 1880; or any knowledge or means of knowledge of any irregularity except the delay in manufacture, at the time when it (Feb. 23, 1881) notified plaintiffs of its refusal to accept any iron except the 1,500 tons made prior to January 1 (Rec. p. 39,48), or at the time when it rejected the spring shipments.

Plaintiff's own evidence—which in these respects is neither helped nor hindered by defendant's evidence—shows breaches of contract and of condition on plaintiffs' part, and no suggestion of any waiver by defendant of any of them. Touching the subject of the variance in the quantities of the different kinds of ore from the amounts stipulated for, the only evidence as to defendant's knowledge is, that it knew nothing about it until the time of the trial of the action brought at Cleveland, in November, 1881. (Rec. pp. 50, 51.) Plaintiffs offer no excuse for their breach of contract in tendering the product of 800 tons too much of ore from the Stephenson Mine, and of 600 tons too little of ore from the Norway Mine; and no excuse for attempt-

ing to force defendant to take and pay for at a rate $18 per ton above its market value (Finding No. 8) the product of 168 tons of ore more than defendant had agreed to buy.

It is submitted, therefore, that defendant's motion should have been granted, and judgment rendered in its favor on the evidence.

As to this 168 tons, plaintiffs' evidence—uncontradicted—showed that the total product of the 14,168 tons of ore was 8,075 tons of iron (Rec. pp. 39, 42,) of which 3,421 tons were shipped in 1880 and the remaining 4,653 tons in 1881.

No knowledge on defendant's part that more than 14,000 tons of ore had been smelted, is shown. It was impossible, of course, for defendant, even if it had known of the excess, to have identified the iron made from it, nor had plaintiffs any right to demand that defendant should either take all the iron, or itself separate from the total mass enough to equal the product of 14,000 tons and no more.

The Circuit Court solved the difficulty, (see the opinion, Rec. p. 33, and also Finding No. 8) by assuming, without any evidence, that 14,000 tons of ore would have produced a round 8,000 tons of iron, and that the surplus 168 tons of ore therefore made the 75 tons of iron by which the total of shipments exceeded 8,000 tons; and then the Court itself made, on paper,

the first separation attempted by anybody of this 75 tons from the rest, and held that defendant was not bound to accept the 75 tons, but was bound to accept the rest. How defendant could have made this discovery at the time when the iron was tendered, and on what principle it was bound to make this separation, does not appear.

Plaintiffs have never attempted to make it. Even in their declaration they allege tender and refusal of the whole 4,653 tons, and assign as the breach the refusal of the whole—not of the 4,579 tons only,

VII.

THE SECOND COUNT.

DEFENDANT'S REFUSAL IN THE WINTER TO ACCEPT IRON IN THE SPRING, WAS NOT ACTED ON BY PLAINTIFFS, AND WAS NOT A BREACH OF CONTRACT NOR A WAIVER OF CONDITIONS.

The original declaration, filed by plaintiffs below, consisted of but one count (Rec. p. 6), which laid as a breach defendant's failure to take and pay for the iron shipped in the spring of 1881, and which, as amended by substituting fuller averments of performance on plaintiffs' part (Rec. p. 18), constitutes the first count of the declaration on which they went to trial. Their second count—added bodily by way of amendment (Rec. p. 15) after a demurrer to the original first count

had been filed (p. 14)—was an afterthought and plainly intended as an attempt to avoid the embarrassment which they, with reason, anticipated that their proof of imperfect performance of their own obligations under the contract, would cause. It differs from their first count only in omitting all allegations of performance except a general one, in adding an allegation of "readiness to perform" on their part, and in laying as the breach that defendant, in or about the month of December, 1880, repudiated the contract and refused, and had ever since refused, to be bound by it or carry it out. So far, then, as it differs from the first count, it is an endeavor on plaintiffs' part, to avail themselves in some way of their vendee's anticipatory renunciation of the contract during the winter, as an excuse for or waiver of their own failure to perform. It amounts, that is, to saying "As defendant refused in the winter to take the iron to be shipped it in the spring, part of which had been made and part was yet to be made, we were relieved from any further performance on our part."

Whether the doctrine of anticipatory breach of contract, developed in *Hochster v. Delatour*, 2 El. and Bl. 678, and in the English and American cases which have followed that decision, will be adopted by this Court is yet uncertain, and in the very late case of *Dingley v. Oler*, 117 U. S. 490, this Court expressly reserved its opinion on the subject. Assuming it to be good law,

however, it cannot avail Rhodes & Bradley here, for two reasons :—

1. Before the notice of renunciation was given by defendant (late in February, 1881; see Finding No. 7), Rhodes & Bradley had already broken some of the conditions on their part to be fulfilled, and had disabled themselves from fulfilling others. So the special findings show. They had failed to provide the proper ores, and the time for delivery had gone by. They had provided too much ore. The manufacture had not been prosecuted with the required diligence during the winter. 2,000 tons of iron still—on February 28th—remained to be made (Finding No. 6,) and it was then physically impossible to complete the manufacture before the close of the winter and the opening of navigation, even by working thenceforward as rapidly as was done in the summer and autumn of 1880 (Finding No. 6.)

For this reason defendant's refusal was justified.

See *Lovell v. St. Louis Mutual Life Ins. Co.* 111 U. S. 264, 274 :

"Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated."

Norrington v. Wright, 115 U. S., see page 205 :

"The plaintiff, denying the defendants' right to

rescind and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action."

2. But whether it was justified or not is immaterial: for Rhodes & Bradley did not attempt to treat it as a renunciation or breach of the contract. They did not cease performance. On the contrary they persisted in it. They did not act upon defendant's notice. They refused to recognize it. They proceeded with the manufacture of the iron, and on its completion they shipped all the iron to Cleveland and tendered it there to defendant.

So Finding No. 6 affirms.

Plaintiffs' own evidence—uncontradicted—affirms it also. (Rec. pp. 42, 44, 48.)

Rhodes & Bradley are therefore in no position to substitute for proof of performance, proof of readiness and willingness to perform: nor would they be so, even if their own evidence did not disprove their allegation of readiness and willingness, as it does in fact disprove it by showing that they had already, before defendant's notice was sent, broken some of their agreements, and that they, in their subsequent attempts to perform, broke others.

At the foundation of the English doctrine of the legal effect of a premature renunciation of contract, lies the case of *Hochster v. Delatour*, 2 E. & B. 678, where the Court of Queen's Bench held that as A in May had told B he would not keep his agreement to take B into his service in June, B might *at his election* treat this refusal as a breach of contract, and sue on it, if he chose, in May.

Two years later (1855), in the same court, the subject again came up, and this time the question was, what plaintiff must do to entitle him to take advantage of such a premature refusal. And it was held that where, as in the cases then before the Court, he had not acted on the refusal, but had declined to recognize it and had insisted on full performance, he lost his privilege of treating it as a breach, and could not "both hold defendant to the prospective performance of the contract and at the same time say it was renounced." (Per Lord Campbell, C. J., 5 E. & B., p. 744.)

Avery v. Bowden, 5 E. & B., 714.

Reid v. Hoskins, 5 E. & B., 729.

In *Frost v. Knight*, L. R. 7 Ex., 111, the same limitation was recognized:

Per Cockburn, C. J. — "The promisee if he "pleases may treat the notice of intention as inopera- "tive, and await the time when the contract is to be "executed, and then hold the other party responsible

"for its non-per formance; *but in that case he keeps the* "*contract alive for the benefit of the other party as well as* "*his own; he remains subject to all the obligations and* "*liabilities under it, and enables the other party* not only "to complete the contract, if so advised, notwithstand- "ing his previous repudiation of it, but also *to take* "*advantage of any supervening circumstance which would* "*justify him in declining to complete it.*"

This passage was quoted with approval by Keating, J., in *Roper v. Johnson*, L. R. 8 C. P., 167; in accordance with it the very recent case of *Johnstone v. Milling*, 16 Q. B. D. 460, was decided (January, 1886); and it was approved also in *Kadish v. Young*, 108 Illinois, 176.

Benjamin on Sales lays down the same principle: "A mere assertion that the party will be unable or will "refuse to perform his contract is not sufficient; it "must be a distinct and unequivocal absolute refusal "to perform the promise, *and must be treated and acted* "*upon as such by the party to whom the promise was made;* "*for if he afterwards continue to urge or demand compli-* "*ance with the contract, it is plain that he does not under-* "*stand it to be at an end.*" *Benjamin on Sales*, Sec. 568, (3d—Bennett's American Edition.)

The opinion in *Smoot's Case*, 15 Wall. 36, cites with approval this passage from Benjamin; and in *Dingley v. Oler*, 117 U.S. 490 this Court, while expressly reserving its opinion on the main question decided in *Hochster v.*

Delatour, again approves Mr. Benjamin's statement of the limitations, and repeats that the refusal, to avail plaintiff, must be acted upon by him.

Hence, in the case at bar, defendant's premature refusal, repudiated by plaintiffs as it was, cannot now be made the foundation of an action, nor can it play any figure in the case either as an anticipatory breach of contract *per se* or as dispensing plaintiffs from full performance on their part.

Stripped of these features, the second count amounts to nothing, or at any rate to nothing more than a repetition of the first count.

Respectfully submitted,

WM. E. CUSHING,
Attorney for Plaintiff in Error.

GEORGE F. EDMUNDS,
of Counsel.

121-255

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

THE CLEVELAND ROLLING MILL COMPANY,
Plaintiff in Error,

vs.

CHARLES D. RHODES AND DAVID C. BRADLEY,
Defendants in Error.

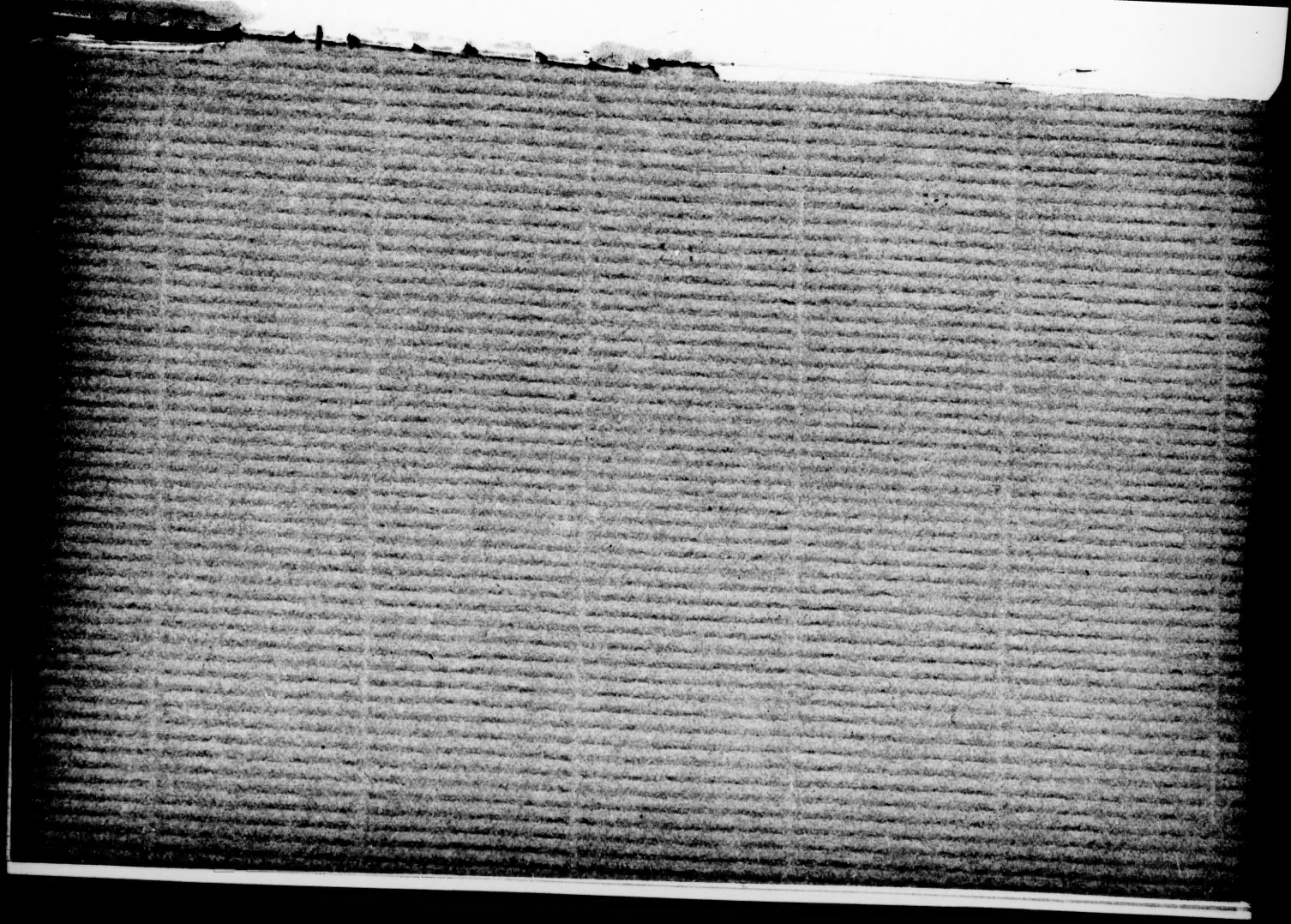
Error to the Circuit Court of the United States, Northern District of Illinois.

Brief and Argument for Defendants in Error.

J. M. FLOWER,

Counsel for Defendants in Error.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
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Brief and Argument for Defendants in Error.

STATEMENT OF FACTS.

In the winter and spring of 1879 and 1880 defendants in error, who were copartners under the firm name of Rhodes & Bradley, and dealers and brokers in iron and iron ores, at Chicago, Illinois, entered into four contracts with as many mining companies for the purchase and delivery to them, during the season of navigation of 1880, of fifteen thousand five hundred tons of iron ore, described as follows and in the following quantities:

Cleveland Iron mine ore, - - - -	6,000 tons.
Norway mine ore, - - - - -	5,000 tons.
Rolling Mill mine ore - - - - -	1,500 tons.
Stephenson mine ore, - - - - -	3,000 tons.

On the 14th day of January, 1880, said Rhodes & Bradley made a contract with the Leland Iron Company, wherein they agreed to furnish to said company properly mined fourteen thousand tons of iron ore, subject to certain contingencies, and upon certain terms therein expressed, to be delivered, fifteen hundred tons in May, navigation permitting, and twenty-five hundred tons each month thereafter as nearly as might be, and all to be delivered on vessel before November first, and in suitable quantities of each for the admixtures desired by said Rhodes & Bradley, and to purchase from said Leland Iron Company, at a certain rate per ton, the entire product of pig iron made from the ores so furnished. The said Leland Iron Company, upon its part, agreed to manufacture pig iron from said ores as nearly as practicable of the grades which the said Rhodes & Bradley desired, and to ship the same in cargo lots as rapidly as possible, during the season of navigation, to them at Chicago or Cleveland.

On the 16th day of February, 1880, Rhodes & Bradley entered into a contract with the Cleveland Rolling Mill Company, wherein and whereby they sold to said company the entire product of fourteen thousand tons of iron ore, to be manufactured into pig iron with charcoal by the Leland Furnace, of Leland, Michigan. Said furnace to make as nearly all numbers one and two iron as possible, and to be shipped in vessel cargoes as rapidly as possible to said company at Cleveland, Ohio, during the season of navigation of 1880. Such portion of the product of said ores as was made after the close of navi-

gation of 1880 was to be shipped by vessel to Cleveland on the opening of navigation in 1881, or as near the opening as possible. Said company agreed to receive said iron as rapidly as shipped, and to pay forty-five dollars cash for same delivered on rail of vessel at Cleveland, Ohio.

It is stated in said contract that the iron ore to be furnished the Leland Iron Company, out of which said iron was to be manufactured, was as follows:

6,000 tons Cleveland mine ore.
5,000 tons Norway mine ore.
1,500 tons Rolling Mill mine ore.
1,500 tons Stephenson mine ore.

It is further stated in said contract that the said Cleveland Rolling Mill Company agreed not to hold Rhodes & Bradley responsible for delivery of pig iron beyond the product of such ores as the mining companies delivered them; also, in case of accidents or strikes at the Leland Furnace, resulting in stoppage of said furnace, they should not be held responsible for non-delivery under that contract beyond the responsibility of the Leland Iron Company to them in the contract beween said iron company and them, dated January 14, 1880, which contract, as well as Rhodes & Bradley's contracts with the mining companies, were made a part of said agreement.

The record shows that Rhodes & Bradley commenced to ship ores to the Leland Iron Company on the 11th day of May, 1880, and continued to ship the same during the season of navigation down to the 18th day of October, 1880, upon which day the last shipment was made. The aggregate of the ore so delivered was 14,168 tons, and the kinds and quantities of ore delivered were as follows:

Cleveland Iron mine ore, -	5,980 tons.
Norway mine ore, - - -	4,505 tons.
Rolling Mill mine ore, - -	1,478 tons.
Stephenson mine ore, - - -	2,305 tons.

These shipments of ore were made more rapidly than the contract with the Leland Iron Company required, but were received by said iron company without objection as to the amounts of monthly shipments, and without delaying in any manner the operation of the furnace.

None of the Norway ore, as appears from an inspection of the record, was shipped from Escanaba to the furnace, until June 15th, 1880. (*Record p. 38.*)

It further appears from the evidence, and the finding of the court on the facts, that the Stephenson and Norway ores were identical in price, value and quality, being on the same vein, and so close together that their workings ran into each other.

During the season of navigation of 1880, and between the 30th day of June and the 8th day of November, seven cargoes of pig iron, aggregating about 3,421 tons, were shipped from the Leland Furnace to Cleveland, and received, accepted and paid for by the Cleveland Rolling Mill Company without objection, either as to the quality of the iron or the times of shipment.

Navigation closed in 1880 about the 15th of November, at which time there was on the dock of the Leland Furnace Company about four hundred tons of pig iron ready for shipment, and thereafter said company continued to manufacture pig iron from the ores delivered to it, being somewhat delayed by scarcity of or inability to promptly obtain charcoal, and on the 7th day of May it had on hand and ready for shipment 3,566 tons of pig iron, and between that date and the 29th day of June, 1881, all of the

ore delivered to said Furnace Company by Rhodes & Bradley had been manufactured into pig iron.

Shipments to Cleveland in the spring of 1881 were resumed on the 8th day of May, and continued at intervals of about a week apart until the second day of July, when the last cargo was dispatched for Cleveland. The aggregate amount of pig iron so shipped after the opening of navigation in 1881 was 4,653 tons — 74 tons being the product of the excess of ore above the 14,000 tons deliv ered by Rhodes & Bradley to the Leland Iron Companp. Each cargo forwarded after the opening of navigagation in the spring of 1881 was duly tendered to the Rolling Mill Company on its arrival at Cleveland, and said company refused to receive or pay for the same, upon the sole ground that they were not liable under the contract to take and pay for any iron manufactured after the close of 1880.

On the 23d of February, 1881, the Cleveland Rolling Mill Company notified Rhodes & Bradley by mail that they did not recognize any contract for pig iron made after December 31, 1880, the old contract having expired at that time.

On the 1st of March, 1881, said company telegraphed to Rhodes & Bradley as follows: "Your contract for "manufacturing pig metal for us gave you no authority to "do so after December 31st, 1880."

On the 15th of May said company telegraphed as follows: "We will take that 1,500 tons made January "first, with the understanding that the entire balance is "declared off. That is the only way we will agree to it."

It further appears from the record, that the capacity of the Leland Furnace Company was from 20 to 25 tons of pig iron per day, of which fact the plaintiff in error was

duly advised, both before and after the execution of the contract between it and Rhodes & Bradley; that the furnace was situated upon the east shore of Lake Michigan, about forty miles south of the Straits of Mackinaw; that there is no harbor at that point, and the only facility for loading vessels is a bridge pier reaching out into the Lake some seven or eight hundred feet, about twenty feet wide at the main part, and thirty-five or forty feet at the extreme end. The iron was hauled onto the pier by teams (not exceeding 150 tons per day), which was not regarded as strong enough to sustain more than 475 tons at once, and it also took a day or two to load a vessel. The exposure was such that at times boats could not get to the pier, and sometimes had to lie outside for a week, and at others were driven away after they had commenced loading.

The fact that some of the ore had not been manufactured at the time of the opening of navigation did not delay in any manner the shipment of the product. The testimony shows that if the entire body of ore had been manufactured before the opening of navigation, no different arrangements would have been made for its shipment than were made, nor could the product have been placed upon the pier and vessels loaded therefrom more rapidly than at the rate of about a cargo a week.

The court further found, as a question ot fact, that the difference between the contract price and the market value at the time and place of delivery of the pig iron, which the Cleveland Rolling Mill Company refused to accept and pay for, was $18 per ton, and the number of tons, 4,579.

Upon these findings of fact the court below concluded that there had been a substantial compliance with the terms of the contract by Rhodes & Bradley, and that there was

no excuse for the breach thereof by the Cleveland Rolling Mill Company, and assessed the damages of the plaintiffs in said action at $82,442.

The counsel for the plaintiff in error, in the assignment of errors, states numerous grounds upon which reliance is placed for a reversal of the judgment of the court below. It is hardly necessary to examine them in detail, as they rest substantially upon the following propositions:

1st—That by the terms of the contract between the parties, the Cleveland Rolling Mill Company is not bound to receive or pay for any iron manufactured under the contract, after the close of the year 1880.

2d—That the parol evidence showing the capacity, situation and surroundings of the Leland Furnace Company, and defendant's knowledge thereof, is inadmissible.

3d—That there was a fatal variance between the pleadings and the proof.

4th—That Rhodes & Bradley failed to perform the contract according to its terms; and

5th—That the damages are excessive, and not supported by the proof.

Brief and Argument.

The determination of the merits of this controversy seems to depend more largely upon a proper application of well-settled principles of law to the peculiar facts of the case, rather than upon a discussion of disputed or doubtful questions of law or evidence, and for the purpose of this argument we shall endeavor to ascertain:

1st—What the contract was between the parties.

2d—Whether the defendants in error have performed the contract upon their part.

3d—Whether the Circuit Court adopted the correct rule of law as to the measure of damages.

I.

CONSTRUCTION OF CONTRACT.

The interpretation of the contract entered into between Rhodes & Bradley and the Cleveland Rolling Mill Company necessarily involves a discussion of the objections made by the Cleveland Rolling Mill Company to the admission of extrinsic evidence. The contract was an agreement of sale by the former to the latter of the entire product of 14,000 tons of iron ore, to be manufactured into pig iron with charcoal by the Leland Furnace Company, as nearly numbers one and two iron as possible, to be shipped in vessel cargoes to Cleveland as rapidly as possible during the season of navigation of 1880; the product thereafter made to be shipped to Cleveland on the opening of navigation in 1881, or as near the opening as possible, for which the Cleveland Rolling Mill Company agreed to pay $45 per ton, delivered in Cleveland. The contract also recites what ores were to be furnished to the Leland Furnace Company, and in what quantities, for the purposes of manufacture, and also upon what ground and to what extent Rhodes & Bradley should be excused from delivery of pig iron in case of accidents or otherwise.

As to the time in which the manufacturing is to be done, the contract is silent. It provides, however, that shipments shall be made in cargo lots, as rapidly as possible, during the season of 1880; and that the product made thereafter should be shipped on the opening of navigation in 1881, or as near the opening as possible. This indi-

cates that it was expected or contemplated that the entire product could not be manufactured nor shipped during the season of 1880.

If we examine the contract between Rhodes & Bradley and the Leland Iron Company, as we properly may do, in view of the fact that it is made a part of the sale contract, we find that that agreement contains this provision: that the shipments are to be made "as rapidly as possible *after manufacture*, during season of navigation." There is nothing upon the face of either contract having a tendency to limit the liability of the Cleveland Rolling Mill Company to take only the manufacture of 1880. The product of the ore was sold before its production; and as the manufacture of it into pig iron necessarily preceded its shipment, it follows that the rapidity of shipments was wholly dependent upon the capacity of the furnace to manufacture. As the contracts in their terms fix no time in which the manufacturing is to be done, it is apparent, under the rules applicable in such cases, that the work must be done within a reasonable time. What is a reasonable time depends upon the capacity of the furnace, its situation and surroundings, none of which appear upon the face of the contracts, and all of which must be shown, to enable the court to ascertain the real intention of the parties. If it should appear that the furnace was of sufficient capacity to reduce the entire body of ore to pig iron before the first of January, there might be some force in the position of counsel that they were not required to take any that was manufactured after that date. While on the other hand, if it should appear that it was absolutely impossible for a furnace of the capacity of the Leland to manufacture 8,000 tons of pig iron during that year, and that such fact was known to the contracting par-

ties at or before the time of executing the contract, the court must presume, from the contract and the situation and surrounding circumstances, that it was the intention of the parties that the ore should be reduced to pig iron as rapidly as possible, due regard being had to the capacity and situation of the furnace, and that the product should be shipped thereafter as fast as possible during the season of navigation until the whole product was delivered. Such an interpretation of the contract does no violence to its language, and contradicts none of its terms. To arrive at any different conclusion the court must find that the parties entered into a contract which all of them knew could not be performed.

The sole object and purpose of the oral testimony, to the introduction of which objection was made, was to show the situation and surroundings of the subject of the contract, so as to enable the court to ascertain and determine the meaning thereof, and the real intention of the parties thereto.

The admissibility of parol testimony to explain the terms of a written instrument, or to aid in its interpretation, is well settled by the decisions of this court.

Reid v. *Insurance Co.*, 95 U. S. 23.
Thorington v. *Smith*, 8 Wall. 1.
U. S. v. *Peck*, 102 U. S. 64.
Bradley v. *Steam Packet Co.*, 13 Peters, 99.

Viewed in the light of the surrounding circumstances and the situation of the parties, and aided by a reference to the contract between Rhodes & Bradley and the Leland Iron Company, we think the court must say that the agreement between the parties to this suit was, that the iron ore in question should be manufactured into pig iron as soon as it

could reasonably be done with the facilities possessed by the Iron Company, and that as fast as it was so manufactured it should be shipped in cargo lots to Cleveland during the seasons of navigation in the years 1880 and 1881.

Under this construction of the contract, the court has found that the pig iron was manufactured without unreasonable delay; that it was shipped as rapidly as possible during the season of navigation of 1880, and after the opening of navigation in the spring of 1881, until the whole product was delivered or delivery tendered.

II.

PERFORMANCE.

It is claimed that the defendants in error did not perform their agreement, because:

1st—The ore out of which the iron was to be manufactured was not delivered to the Leland Iron Company at the times and in the quantities specified in the contract.

2d—That such ores were not delivered and manufactured in the proportions specified in said contract.

3d—That delivery of the product was not made as rapidly as possible after the opening of navigation in the spring of 1881.

The consideration of these three objections involves also the question of variance between the pleadings and the evidence.

1.

Counsel for the plaintiffs in error seem to be of the opinion that Rhodes & Bradley, in order to recover against the Cleveland Rolling Mill Company, must show not only performance of their contract with it, but also performance of all the contracts made by them with the mining companies, or the Leland Iron Company.

We hardly think that this position can be maintained. The first two paragraphs in the Rolling Mill contract contain substantially the agreement between the parties, and is complete in itself. It is a sale of the product of 14,000 tons of ore into pig iron of a certain quality, to be delivered at certain times and places, at a certain price per ton, which the company agrees to pay. Had the contract ended here, as it might well have done, Rhodes & Bradley would have been absolutely liable upon their contract, whether they were able to obtain the ore or not, or whether the Leland Company manufactured it into pig iron or not. For the purpose, therefore, and apparently for no other, so far as we can discover, of limiting their liability in the event of certain contingencies, Rhodes & Bradley incorporated the mining contracts and the manufacturing contract into their sale contract, so that they should not be held to any greater liability under that contract for non-delivery of ores, or failure to manufacture the same, than the liability of the ore companies or the manufacturing company to them. For that reason only, we apprehend, the ore to be furnished to the Leland Company is specified in the sale contract, and the preceding contracts incorporated therein.

As to the time of the delivery of the ore by Rhodes & Bradley to the Leland Iron Company, the court finds as a fact that such delivery was made between the 16th day of May and the 18th day of October, 1880, which he evidently regarded as a substantial compliance in that respect with the requirements of the Leland contract. Although by its terms fifteen hundred tons were to be furnished in May, navigation permitting, and twenty-five hundred tons each month thereafter, as nearly as might be, yet, if the ore was delivered more rapidly than

agreed, especially if the same was received by the manufacturer without objection, it would seem to be a sufficient compliance therewith. The Cleveland Rolling Mill Company had no interest in this matter whatever, except that the delivery of the ore should be commenced immediately after the opening of navigation in 1880, and continue during that season in quantities sufficient to keep the furnace in full operation and to be wholly completed before November 1, 1880, so as to have the same on hand for manufacture after the close of navigation.

The complaint is that the ores were delivered to and accepted by the manufacturer more rapidly than the contract called for, and therefore the contract has not been performed according to its terms, and the Rolling Mill Company is under no obligation to carry out its agreement to receive and pay for the product of such ores.

It hardly seems probable that it was intended by the parties to the contract of sale, that the ore and manufacturing contracts should be made part thereof, to the extent of requiring Rhodes & Bradley to aver and prove absolute performance of all of the terms and conditions of said contracts, as a condition precedent to a recovery upon such contract of sale. If so, then Rhodes & Bradley must allege and prove that they have paid for the ores according to the terms of their respective contracts with the mining companies; that they paid drafts of the Leland Iron Company for freights upon the ores; that they advanced freight charges on shipments of pig iron to Cleveland; that they advanced twelve dollars per ton to the manufacturers, etc. None of these are material conditions so far as the Rolling Mill Company is concerned; nor is the time of the delivery of the ores, so long as such

company is not damaged thereby; and therefore none of these matters need be avered or proved.

It seems to us that this case is clearly distinguishable from that of *Norrington* v. *Wright*, recently decided by this court, and reported in Volume 115 U. S. page 188. In that case the vendee rescinded the contract after the first delivery, because of failure to deliver iron rails in the quantities and at the times specified in the contract of sale. The court, in its opinion, says: "In the contracts of mer-"chants, time is of the essence. The time of shipment is the "usual and convenient means of fixing the probable time of "arrival, with a view of providing funds to pay for the goods, "or of fulfilling contracts with third persons. A statement "descriptive of the subject matter, or of some material inci-"dent, such as the time or place of shipment, is ordinarily "to be regarded as a warranty, in the sense in which that "term is used in insurance and maritime law, that is to "say, a condition precedent, upon the failure or non-"performance of which the party aggrieved may repudiate "the whole contract."

The material incidents in the contract of sale between Rhodes & Bradley and the Cleveland Rolling Mill Company seem to be:

1. The manufacture of 14,000 tons of iron ore into pig iron, as soon as the same could reasonably be done, by the Leland Iron Company.

2. The quality of the product to be as nearly numbers one and two iron as possible.

3. The delivery of the iron in cargo lots at Cleveland as rapidly as possible after manufacture, during the seasons of navigation.

These are, undoubtedly, the conditions precedent to the recovery, and the failure to comply with them would

justify a repudiation of the contract: but the mere failure to deliver the ore out of which the iron is to be manufactured, in the precise monthly quantities stipulated in another contract, especially if such delivery is made sooner than it is required to be done by such contract, and received without objection by the manufacturer, would hardly justify the vendee in its refusal to comply with its contract.

The vendee was not, and from the very nature and circumstances of the case could not, be damaged thereby, and has no right to complain thereof. It is, to all intents and purposes, a substantial performance in that respect.

2.

It is further objected that Rhodes & Bradley did not deliver to the Leland Iron Company ore in the proportion stipulated by the contract. The amounts called for and the amounts delivered, as found by the court, and the differences, are as follows:

Cleveland mine ore	6,000 tons	Delivered	5,980 tons	Deficiency	20 tons
Norway mine ore...	5,000 "	"	4,405 "	"	595 "
Rolling Mill mine ore	1,500 "	"	1,478 "	"	22 "
Stephenson mine ore	1,500 "	"	2,305 "	Excess	805 "
Total	14,000 tons.		14,168 tons.		

Upon this branch of the case the court finds as a fact, that the Stephenson and Norway ores are identical in quality and value, and cost the same price per ton.

The mines were on the same vein and close together, and their workings ran into each other. The conclusion drawn by the court is, that the slight shortages in the quantities of Cleveland and Rolling Mill ore are in no sense material, and the quantities are as close as can easily be practically arrived at in the transportation by vessel cargoes of so large volumes of any commodity; and that the excess of Stephenson ore has in no perceptible way affected the character of the product of these ores, and that

these facts furnish no excuse for a breach of the contract by the defendant. In short, that the deliveries as made constitute a substantial compliance with the terms of the contract in that respect

Whether the court is correct in these conclusions depends upon the interpretation to be given to the contract. Before such conclusions are disturbed, we apprehend that this court, after a careful inspection of the sale contract and the other contracts therein referred to, aided by extrinsic testimony as to the situation of the parties and the surrounding circumstances, must be of the opinion that it was clearly the intent of the parties that the product of iron ore which product was sold to the Cleveland Rolling Mill Company must contain five thousand tons of ore called "Norway ore," and that ore taken from the same vein, and of the same quality; in fact the same ore in every respect, except in name, was not contemplated, and could not be substituted; in short, that the parties stipulated for ore of a certain name, and not for ore of a certain character and quality. There was no difference whatever in the ores, except in name, and none whatever in the product. The pig iron would have been the same in quality if 6,500 tons of either Norway or Stephenson ore had been used, instead of 5,000 of the one and 1,500 of the other. In fact, the first 700 tons of pig iron manufactured by the Leland furnace contained no Norway ore, as none was shipped from Escanaba until June 15, 1880, and yet the product was received without objection as to quality or otherwise. If it was intended that the product of the ore should be made absolutely of the various ores named in the contracts, in proportion to the amounts of each, at least 400 tons of the Norway ores should have been incorporated into the first 700 tons of pig iron manufactured; and yet its ab-

sence does not appear to have in any manner affected the quality of the product; nor has any complaint ever been made in that respect, although the iron in which the Norway ore was lacking was the first iron delivered.

We can readily understand how value may attach to the use of a name as applied to an ore, or to a brand as applied to an article of manufacture; but where the ore, as in this case, absolutely loses both its name and its identity in the product, it would seem that it is the character and quality, and not the name, which the parties had in contemplation, and that the substitution of any ore, however different in name, which is identical in character and quality, would be permissible and a substantial compliance.

Upon this branch of the case we call the attention of the court to the case of *Hopkins* v. *Hitchcock*, 32 L. J. C. P. 154. The facts in that case were as follows:

Snowden and Hitchcock were iron manufacturers, and stamped their iron "S. & H.," with a crown. Snowden retired from the business, and it was continued by Hitchcock & Co., who stamped their iron "H. & Co.," with a crown. A London broker called upon the agents of Hitchcock & Co., and asked the price of "S. & H. Crown bar," and was informed of the change in the firm, and given the price current, in which were the words, "Every description of iron manufactured at these works is stamped H. & Co. Crown common or H. & Co. Crown best;" all of which was communicated to the defendant Hitchcock, who thereupon ordered 67 tons of iron. The following memorandum was made and delivered to the purchaser: "Sold for the account of H. & Co., to our principal, H. S. Hitchcock, 67 tons S. & H. Crown common bar, as per specifications herewith, 6l. 10s. per ton. (Specifica-

tions then following.) Signed: Tregelles & Taylor, commission agents."

The iron when delivered was marked "H. & Co., Crown," and not "S. & H. Crown," and was rejected by the purchaser on that account. It was found by the jury that the variation in the brand was of no importance, and they found generally a verdict for the plaintiff, leave being reserved to the defendant to move to set this verdict aside, and to enter it for him, on the ground that their on supplied did not comply with the contract.

The views expressed by the Judges were as follows:

ERLE, C. J.—"I am of opinion that this rule ought to be discharged. The action was brought to recover the price of certain bar iron, and the purchaser contended that the plaintiffs had not performed their part of the contract, because, having agreed to sell bars marked "S. & H." with a crown, they delivered bars marked "H. & Co." I have been carefully considering the words of this contract, but on the whole I am clear that, taking all the surrounding circumstances into consideration, it was not a contract for iron marked with that particular brand of "S. & H." A firm acquainted with iron so marked made inquiries for it, when it was found that the business formerly carried on by Snowden & Hitchcock was continued by Hitchcock & Co., and that the iron formerly marked "S. & H." was now marked "H. & Co." The defendant, when informed of this, raises no objection on that account, but enters into a contract with Hopkins & Co. for the supply of what, in the brokers' note, are described as "S. & H." bars. The fair inference from this is that the defendant intended to purchase of Hopkins & Co. iron of the same quality as that formerly bought by him, and which was then made by Snowden &

Hopkins, and marked with their names. At the trial the defendant's case was, that the letters "S. & H." formed part of a well-known brand, and that it was, therefore, of the essence of the contract that the iron should bear those letters impressed upon it; but the jury have found that fact against him. I think that, taking the true construction of this contract upon the facts as found, the verdict for the plaintiffs ought to stand. I come to this conclusion with a full perception of the extreme importance of words of this kind used as a part of the description of an article in a contract; they frequently become a most essential part of the contract. But I think this was not a contract for iron of that particular brand, but only for iron of a certain quality; and, beyond all doubt, the defendant got iron of the quality stipulated for."

WILES, J.—"I am of the same opinion. It is quite familiar that in many instances a particular brand may be of the greatest possible value, even though in reality it may not affect the quality of the article on which it is impressed. It may either indicate that the article was made by a particular person or firm, and so serve as a guaranty for its excellence, or it may have a merely capricious value; as where the article is intended to be sold in a place where the brand is known, and from mere inveteracy of habit people choose to go on purchasing those articles of the kind only which are marked in a particular way, and to which they have always been accustomed. It is clear, also, that whether the brand be of value or not, if a purchaser stipulates that the article which he buys shall be stamped with a particular brand, he has a right to object if the article when furnished to him is not so stamped. But when it is not perfectly clear on the contract whether or no the purchaser intended to stipulate expressly for the brand, it

is by no means immaterial to ascertain whether or no the brand is of any value. The jury have found that in this case it is not. Now, the contract is not for the purchase of iron bearing such and such a brand, but it is for a certain description of iron; and there is nothing in the nature of the case which would lead me to say that the words used imply that the iron should bear a particular brand. Moreover, there is a most reasonable explanation of how the letters "S. & H." and not "H. & Co." came to be used in the contract. The iron was to be supplied by Hopkins & Co., who were known by the defendant to have succeeded to the firm of Snowden & Co.; and the letters "S. & H." were merely inserted to describe the quality of the article which was already known under that name to the defendant. It is not, therefore, necessary to resort to the doctrine of *falsa demonstratio;* though, the article being sufficiently ascertained otherwise, we might do so, if necessary."

BYLES, J.—"I am of the same opinion. I am fully sensible of the great value of some kinds of brands; and if the jury had found that this was a well-known brand, which would sell iron of almost any quality (I put the case strongly for the sake of illustration), the case might have been different. But, on the contrary, they find that these letters were of no value whatever. Now, the contract does not expressly stipulate for iron which bears a particular brand, but merely describes the iron in a particular way, and perhaps not inaccurately, meaning iron of such a quality as was formerly made by Snowden & Hopkins, and marked with their name."

KEATING, J.—"During the course of the argument, I entertained some doubt whether the defendant had not

stipulated for iron marked with a particular brand, which, of course, he had a right to do; and if so, the plaintiffs had clearly failed to comply with that stipulation. The question turns entirely upon the construction of the contract, taken in connection with the surrounding circumstances; and I think, on consideration, that these letters describe the quality of the iron only, upon which point no complaint is now made."

Rule discharged.

It is the product and not the ores, and pig iron of certain grades, numbers one and two, and not ores of certain mines, that the one party sells and the other agrees to receive and pay for.

It is true that the sale contract gives the description and the amount of the various ores to be furnished to the Leland Iron Company, out of which the iron is to be manufactured; but as this is followed by a recital as to the mining and manufacturing contracts, with the apparent object simply of limiting the liability of Rhodes & Bradley in the event of certain contingencies, it seems to us that the true interpretation of the contract in this respect must be simply to limit the effect of these recitals to the object sought to be accomplished thereby. If Rhodes & Bradley delivered the ore to the Leland Iron Company in different proportions than the contract with them called for, they would have been bound unquestionably to take the product of the ore so delivered, and it seems to follow that the Cleveland Rolling Mill Company would be bound to take the same product to the amount of their contract, provided that such product was of the character, quality and grade stipulated for.

If the court, however, should be of a different opinion in its interpretation of the sale contract, and

should conclude that the parties intended that the ore to be used should be of the precise quantities and names mentioned in the contracts, and no others, then it follows that the Cleveland Rolling Mill Company, in view of the limitations contained in said contract, would be required to take the product of so much of the ores named as were actually delivered.

If such is the correct interpretation of the contract, it could well have happened in case of strikes, that the Cleveland Rolling Mill Company would be required to take the product of one or two of the ores, when their real intention and expectation was that the pig iron should be the product of a mixture of all of them.

For illustration, suppose that because of strikes no Norway nor Stephenson ore was delivered whatever, the liability under the contract being waived to that extent, the Rolling Mill Company would be compelled to accept and pay for a product of the two remaining ores, which they might or might not want.

The ores actually delivered of the precise name mentioned in the contract, are as follows:

Cleveland mine ore,	5,980 tons.
Norway mine ore,	4,405 tons.
Rolling Mill ore,	1,478 tons.
Stephenson mine ore,	1,500 tons.
Total,	13,360 tons.

If there was to be no right of substitution of Stephenson ore for Norway ore, then the product, instead of being 8,000 tons of pig iron from 14,000 tons of ore, would be 7,636 tons from 13,363 tons of ore, being at the rate of $\frac{4}{7}$ of a ton of pig iron to each ton of ore. Upon this basis, the amount of pig iron which the Rolling Mill Company

refused to receive and pay for is reduced from 4,579 tons, as found by the court, to 4,242 tons, and the damages assessed from $82,422 to $76,356, a difference of $6,066.

Upon the theory, then, that the product must be from the specific ores named, or from so much of said ores as the mining companies should deliver to Rhodes & Bradley, the judgment of the Circuit Court should have been for $76,356 instead of $82,422.

Upon this view of the case it would seem that the effect of the non-delivery of any of the ores did not operate to annul the contract, but simply to reduce the amount of the product which the vendors were required to deliver and the vendees to receive and pay for.

In the case of *King et al.*, v. *Parker*, reported in 34 L. T. N. S. 887, Ex. Div. a construction was given to a clause of a contract excusing or postponing its performance. Action was brought upon a bought note, which reads as follows: "Mersey Wall Works, Stourbridge, 13th September, 1873. Bought of John King & Co., Netherland Park Collieries, Stourbridge, 4,000 parcels of Kibbles coal, at 15s. and 6d. per pound, of 2,240 lbs., loaded into my trucks at their sidings on the Cradley Park Branch of Stourbridge Railway, at the average rate of two trucks per day. Payment in cash on the 10th day of each month, less two and one-half per cent. discount. In the event of a colliers' strike or accident, they do not bind themselves to keep up the daily supply. Thomas Parker." The sold note was a duplicate, signed by the plaintiffs. After delivery of a part of the coal there was a strike at the pits, which lasted from the 28th day of March, 1874, to the 28th day of July following, during which time no deliveries were made. After the strike the plaintiff offered to deliver the remainder of the

coal under the contract, which the defendant refused to accept. Held, that the effect of the strike was merely to postpone and delay delivery, and that the defendant was bound to accept the coal which still remained undelivered under the contract, and that also under the circumstances the delay was not of such a nature as to entitle the defendant to consider the contract at an end in a commercial sense, and so repudiate the performance of it.

So, in the case at bar, we apprehend the limitation of the liability of Rhodes & Bradley does not operate to release the Rolling Mill Company from its agreement to take the product of so much of the ores as were delivered by the mining companies to them, and by them to the Leland Iron Company.

3.

It is further claimed that delivery was not made nor tendered, as required by the contract of sale, and that therefore the vendee is discharged from his liability thereunder. No complaint can very well be made of the shipments in 1880, as they were received without objection and paid for. During that season seven cargoes were forwarded in a period of about twenty weeks, being as fast as the iron could be manufactured, but not as fast as the shipments could have been made had the product been on hand at the opening of navigation. In the season of 1881, eight cargoes of iron were forwarded in as many weeks, which were as fast as they could reasonably be made with the facilities possessed by the Leland Iron Company. Shipments at the rate of one cargo in every three weeks, during 1880, were received without objection, and apparently as being in compliance with the terms of the contract. It would seem, therefore, that shipments at the rate of one a week, commencing with the opening of navigation in 1881, in

view of the facilities for shipment possessed by the Leland Iron Company, ought to be regarded as a substantial performance of the contract in that respect, especially as the refusal to take delivery was not based upon the ground that the tender was not made in apt time, but for the reason that the Cleveland Rolling Mill Company was not required to take any iron manufactured after the close of the year 1880. If that company desired to avail itself of the defense that delivery was not tendered in due season, it should have so stated at the time and have refused to accept for that reason. The refusal, however, was placed upon the ground that it had not bought the iron manufactured after the year 1880, and good faith requires that it should be held to that defense.

In the case of *Weinecke* v. *Falk*, 61 Wis. 623, it was held that the refusal of a buyer to accept property, on the ground that the contract was illegal, estopped him from afterwards raising the objection of non-compliance. That was an action for the purchase price of a carriage which the purchaser refused to receive upon the ground that no legal contract had ever been made to purchase it. Upon the trial the defendant in that suit sought to change his position, and justified his refusal to accept on the ground that the carriage tendered was not such as was ordered; that it did not comply with the contract.

The court says: "This objection at this late day "comes with bad grace, and is hardly consistent with the "rules of good faith and honest dealing. The defendant "should have said, when the carriage was finished and he "was called upon to take it, that it was not such a carriage "as he had contracted for; that it was not like the Ball car-"riage, and objected to receiving it upon that ground; but

" this he did not do. The refusal to accept was placed upon " the ground that he had not bought the carriage and did " not want it."

The general rule with reference to performance where anything has to be done, as goods to be manufactured or delivered, or the like, and no time is specified in the contract, is, that it is a presumption of law that the thing should be done in a reasonable time. What is a reasonable time is a question of law for the court, which will take into consideration all the facts and circumstances of the case in reaching a determination; and if a manufacturer agrees to make and finish certain goods " as soon as possible," this means within a reasonable time, due regard being had to the manufacturer's means, his engagements and the nature of the article.

2 Parsons on Contracts, 535, 497, 498.
Atwood v. *Emory*, 1 C. B. N. S. 110.

Substantial performance is all that is required to satisfy such a contract.

Swaine v. *Semans*, 9 Wall. 263.
Weinecke v. *Falk*, 61 Wis. 623.
Woods v. *Miller*, 55 Iowa, 168.

Upon the facts disclosed in the record, and in view of the authorities cited, it seems clear to us that Rhodes & Bradley must be held to have complied with all of the material terms and conditions of the sale contract, and to have substantially performed their agreement.

As to the objection of variance between the pleadings and proofs, it is perhaps sufficient to say that performance of the contract is averred in the declaration in the language of the instrument; and if substantial performance has been established, as we claim, it is difficult

to see how there can be such variance as to justify a reversal of the judgment of the court below.

III.

DAMAGES.

It is urged in this case that the court erred in its assessment of damages. We understand the rule to be in a suit brought against a vendor for refusal to receive and pay for merchandise, that the measure of damages is the difference between the contract and market price of the article sold at the time when and the place where it should have been accepted.

1 Sedgwick on Damages, 595, and notes.

This rule was followed by the Circuit Court, who found, as a question of fact, that the market value at the time and place of delivery of the iron in controversy was twenty-seven dollars per ton, and that the difference between the contract price and the market price was eighteen dollars per ton—the price fixed by the contract being forty-five dollars. We apprehend, however, that this court will not disturb the finding of the court in that respect so far as the fact is concerned, provided he has ascertained that fact in accordance with the rules of law.

If, in the construction of the contract, this court should be of the opinion that the liability of the Cleveland Rolling Mill Company was to receive and pay for the product or so much of the specific ores named in the sale contract as should be delivered to the Leland Iron Company, thereby reducing the number of tons from eight thousand to seven thousand six hundred and thirty-six tons of pig iron, we apprehend that instead of setting aside the judgment of the court below, and sending the case back for further pro-